Supreme Court, U.S.
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No. 01- _____

IN THE
SUPREME COURT OF THE UNITED STATES

Maria Hsia,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Election Campaign Act ("FECA") comprehensively regulates enforcement of the federal election laws. For years, illegal campaign contributions were prosecuted under 2 U.S.C. § 437g (the FECA enforcement provision). With the establishment of the Campaign Financing Task Force in 1996, however, the Department of Justice initiated a series of prosecutions premised on violations of FECA but brought under Title 18. Petitioner's convictions for "causing false statements" to the Federal Election Commission ("FEC"), brought under 18 U.S.C. §§ 2(b) and 1001(a)(2), are the first following a jury trial. The questions presented are:

1. Whether knowledge of illegality is required to satisfy the element of "willfulness" in a criminal prosecution for causing false statements to the FEC under 18 U.S.C. §§ 2(b) and 1001, an issue on which the Courts of Appeals are squarely split.

2. Whether, under 18 U.S.C. §§ 2(b) and 1001, the requisite intent to cause false statements requires proof of the underlying facts that would cause statements to be made and to be false; namely, knowledge of the regulatory scheme that requires statements in FEC reports and defines their "falsity."

3. Whether Congress intended that an alleged violation of the carefully calibrated campaign finance regime established by FECA must be prosecuted exclusively pursuant to FECA's criminal enforcement provisions.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Maria Hsia respectfully prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The district court's opinion granting Petitioner's motion to dismiss the "causing false statements" to the Federal Election Commission ("FEC") counts from the indictment is reported at 24 F. Supp. 2d 33 and reproduced in the Appendix ("App.") to this Petition. (App. 25a-87a.) The court of appeals' decision reversing the district court is reported at 176 F.3d 517 and reproduced at App. 7a-24a. The post-trial judgment and memorandum opinion of the court of appeals, affirming Petitioner's conviction of five counts of "causing false statements," reproduced at App. 1a-6a, is not otherwise published.

JURISDICTION

The court of appeals entered its judgment on December 11, 2001. (App. 1a.) Petitioner's timely petitions for rehearing and rehearing en banc were denied on February 15, 2002. (App. 161a-162a.) This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 2 U.S.C. § 441f of the Federal Election Campaign Act ("FECA") provides:

No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

Title 2 U.S.C. § 437g, which includes FECA's criminal enforcement provision, is reproduced at App. 163a-171a.

The following parts of Title 18 are relevant to this Petition:

§ 1001(a): Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . .

(2) makes any materially false, fictitious, or fraudulent statement or representation; . . .

shall be fined under this title or imprisoned not more than 5 years, or both.[1]

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[1] Although this, the current version of 18 U.S.C. § 1001, applies only to one of the five "causing false statements" charges, the differences between the current and the preceding version of the statute are immaterial to this case. *See* App. 10a, n.2.

§ 2(b): Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

INTRODUCTION

This case presents fundamental questions concerning governmental regulation of campaign finance, an area of law that, as this Court has recognized repeatedly, is of paramount constitutional importance.

First, this case presents the question whether, in a "causing false statements" prosecution under 18 U.S.C. §§ 2(b) and 1001, the highly technical campaign financing laws require a finding of knowledge of illegality to meet the standard of "willfulness" under § 2(b). The courts of appeals are squarely split on this issue, with the Third Circuit finding knowledge of illegality to be a requirement under § 2(b) and the D.C. Circuit explicitly rejecting the Third Circuit's holding. (App. 11a-12a.) ("*Hsia I*"). In light of the complexity and constitutional sensitivity of FECA, a finding of knowledge of illegality is a prerequisite for "willfulness" in the election law context because it provides notice and precludes unfairly trapping individuals engaged in innocent activity.

Second, this case presents the question whether an individual can be convicted of causing false statements if she did not know that statements would be made or that they would be false. Quite separate from knowledge of illegality is the requirement that Petitioner know that there is a regulatory scheme that requires statements and regulates their contents. Regardless of whether this Court finds that knowledge of illegality is required, Petitioner should not have been convicted without the jury's consideration of

whether she knew the facts necessary to comprise a violation under §§ 2(b) and 1001. Without such factual knowledge, she could not have acted "knowingly" and "willfully" pursuant to this Court's definitions of those terms. *See Bryan v. United States*, 524 U.S. 184, 192-93 (1998) ("knowingly" requires proof of the facts that constitute the offense; "willfully" requires a culpable state of mind or knowledge of the law).

Third, this case presents the threshold question whether First Amendment concerns and congressional intent require that FECA violations be enforced pursuant to the carefully calibrated and reticulated FECA statute; thus, precluding prosecution under 18 U.S.C. §§ 2(b) and 1001. This unresolved but ultimately controlling issue presents critical questions regarding congressional intent and the First Amendment in the campaign finance context. Under this Court's precedents, a prosecution based on FECA violations may not be brought under 18 U.S.C. §§ 2(b) and 1001 because Congress intended that FECA's First Amendment sensitive regime occupy the field.

These related issues are of recurring importance and warrant this Court's review.

STATEMENT OF THE CASE

Petitioner was convicted of causing political campaign committee treasurers to file false reports with the FEC. She was found guilty of violating 18 U.S.C. §§ 2(b) and 1001; not FECA, which comprehensively regulates campaign contributions, political committee disclosure reports of campaign contributions, and the enforcement of all FECA violations.

Pre-trial, the district court followed a similar case in the Third Circuit and held that the test for willfulness in the election law context required that Petitioner know the reporting requirements, have attempted to frustrate those requirements, and know that her actions were illegal to be found guilty. On interlocutory appeal, the court of appeals reversed the district court's decision and held that Petitioner did not have to know that her actions were illegal to have caused a false statement to the FEC.

Following the trial, the district court instructed the jury that the government need not prove that Petitioner knew the reporting requirements of the FEC to have caused false statements to the FEC. As the court of appeals recognized at oral argument, this instruction was erroneous and allowed Petitioner to be convicted based on a strict liability standard because the government did not have to prove that she had knowledge of the facts underlying the crimes of conviction. (App. 145a-147a.)

Because the jury was instructed that it did not have to consider whether Petitioner knew the reporting requirements that required and circumscribed the contents of the statements, Petitioner was convicted of causing statements that she did not know would be made or would be false. The court of appeals' holding merits this Court's immediate review to prevent felony prosecutions in the election law context based on strict liability. The Court should either (1) define a workable standard for "knowledge" and "willfulness" in the campaign financing context that takes into account the First Amendment-sensitive FECA regulatory framework; or (2) preclude FECA enforcement under Title 18 because Petitioner's convictions illustrate the danger inherent in enforcing FECA compliance with remedies outside the regulatory scheme contemplated by Congress.

Statutory Framework

Since 1907, Congress has enacted numerous statutes intended to regulate federal campaign financing, an area of well-recognized First Amendment sensitivity. *See, e.g.*, *United States v. UAW*, 352 U.S. 567, 568-83 (1957); *United States v. CIO*, 335 U.S. 106, 120 (1948). It was not until 1972, however, that Congress enacted a comprehensive regulatory scheme, the Federal Election Campaign Act of 1971, closing many of the loopholes in the earlier laws. Pub. L. No. 92-225, 86 Stat. 3 (1972). In 1974, following the Watergate scandal, FECA was revised and expanded substantially. *See* Pub. L. No. 93-443, 88 Stat. 1263 (1974).

FECA, described by this Court as "[t]he intricate statutory scheme adopted by Congress to regulate federal election campaigns," reached the Court in *Buckley v. Valeo*, 424 U.S. 1, 12 (1976). Recognizing that "[t]he Act's contribution and expenditure limitations," as well as its disclosure requirements, "operate in an area of the most fundamental First Amendment activities," the Court held that numerous FECA provisions were unconstitutional restrictions on First Amendment rights to political expression and association. *Id.* at 14, 64. The Court made clear that strict scrutiny of FECA provisions was required because the area was "permeated by First Amendment interests;" otherwise, the Court warned, the statute might "deter those who seek to exercise protected First Amendment rights." *Id.* at 41, 77.

In response, Congress in 1976 again significantly amended FECA, with the express purpose of adhering to *Buckley's* constraints. Pub. L. No. 94-283, 90 Stat. 475 (1976). Significantly, Congress centralized and reorganized FECA's enforcement scheme. "[G]uided" by certain "basic principles," in particular the principle that "election

campaigns are the central expression of this country's democratic ideal," Congress made clear in its post-Buckley revisions that it intended to "promote greater uniformity and certainty in enforcing the law." H.R. Rep. No. 94-917, at 2-4 (1976). It was "essential in this sensitive area," Congress emphasized, to "simplify and rationalize" the "system of administration and enforcement." *Id.* at 3.

Thus, Congress eliminated all felonies, transferring the numerous criminal code provisions regulating federal political activity from Title 18 to FECA's Title 2, and "place[d] its reliance on civil enforcement" (particularly conciliation) and disclosure, "except as to substantial violations," that is, serious "knowing and willful violations" of Title 2 committed within a three-year statute of limitations. H.R. Rep. No. 94-917, at 3-4. *See also* S. Rep. No. 94-677, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 940.

The level of intent required to support a violation was the centerpiece of the 1976 FECA amendments. The "knowing and willful" intent requirement expressly was intended to limit liability to cases in which "the acts were committed with a knowledge of all the relevant facts and a recognition that the action is prohibited by law." H.R. Rep. No. 94-917, at 4 (1976).[2] Thus, the Act provided in a consolidated penalty provision that "*knowing and willful*" violations of FECA involving the making, receiving or

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2 Then Representative Rostenkowski raised the concern that the earlier FECA "provid[ed] harsh penalties for what may be innocent and often unknowing violations of its more technical requirements .... [W]e have arrived at a very sorry state when a taxpayer becomes a criminal because he did not know that he must disclose certain information ...." 122 Cong. Rec. H8577 (Mar. 30, 1976).

reporting of a contribution or expenditure over $1000 could be subject to a *misdemeanor* penalty.[3] Other "knowing and willful" violations, including those that did not reach the monetary jurisdictional floor, were subject to FEC actions, from conciliation to a civil suit seeking a substantial civil penalty. (App. 164a-166a.) Violations not committed in a "knowing and willful" manner could be addressed via conciliation or a relatively modest penalty. (App. 165a.) The comprehensive enforcement scheme applied to all of FECA's provisions, including the provision that "[n]o person shall make a contribution in the name of another person." 2 U.S.C. § 441f.[4]

For twelve years, from 1976 through 1988, the FEC and the Department of Justice addressed violations of FECA, including the prohibition on "contributions in the name of another," exclusively pursuant to FECA's enforcement provisions.[5] The FEC investigated the vast majority of alleged contributions in the name of another, proceeding either with conciliation or with civil action in federal district

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3 The misdemeanor penalty imposed by the 1976 FECA Amendments codified at 2 U.S.C. § 441j (1976) (repealed 1980), was made part of Section 437g in 1979 in substantially the same form. *See* 2 U.S.C. § 437g(d)(1)(A) (App. 170a-171a.)

4 Originally enacted as part of Title 2 in the 1971 FECA, this provision was moved to Title 18 in 1974. It was placed back in Title 2 after *Buckley*, accompanied by the other Title 18 campaign finance felony and misdemeanor provisions.

5 The Memorandum of Understanding ("MOU") between the Department of Justice and the Federal Election Commission always assumed that the Department would prosecute serious FECA violations only under FECA's misdemeanor enforcement provision, 2 U.S.C. § 437g(d). *Department of Justice Manual*, 9-1384.126 (1995-3 Supp.).

court. As contemplated by Congress and the statute, the Attorney General prosecuted as misdemeanors serious "*knowing and willful*" "contributions in the name of another" over $1000 ($2000 after the 1979 amendments) that had been committed within the three year statute of limitations.[6]

During that period, the Department, recognizing the "presence of First Amendment overtones in nearly all FECA violations," observed that "[c]riminal violations of the FECA differ from noncriminal violations . . . principally in the degree of criminal intent involved." U.S. Department of Justice, *Federal Prosecution of Election Offenses* 40-41 (4th ed. 1984) ("1984 Manual").[7] In 1988, however, the Department radically changed its approach because FECA had "many features that render it difficult to use," including FECA's "knowing and willful" requirement, the monetary jurisdictional floor, the venue requirement, and the three-year statute of limitations. U.S. Department of Justice, *Federal Prosecution of Election Offenses* 73-75 (5th ed. 1988) ("1988 Manual").[8] The 1988 Manual recommended

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6 *See, e.g., United States v. Passodelis*, 615 F.2d 975 (3d Cir. 1980); *United States v. Hankin*, 607 F.2d 611 (3d Cir. 1979).

7 "[T]he substantive provisions of the Act are [largely] regulatory *malum prohibitum*," and thus, in the Department's view during that time, "require[ ] proof either that [a] would-be [FECA] defendant had an active awareness that he was violating the law when he committed the transgression in question, or that he was otherwise acting with 'evil' motive or purpose." U.S. Department of Justice, *Federal Prosecution of Election Offenses* 30 (2d ed. 1980) ("1980 Manual"). The 1980 Manual confirmed that there is "nothing inherently wrongful or socially deviant about the vast majority of the conduct covered by the campaign finance laws." *Id.*

8 The Department was particularly unhappy that FECA requires a high level of intent—knowing and willful activity—"and yet it provides for only misdemeanor sanctions." 1988 Manual, at 75.

that prosecutors "attempt to use alternative prosecutive theories to reach FECA crimes wherever possible" and proposed the notion that a conduit contribution is "capable of being characterized as a violation of the federal false statements statute." *Id.* at 75-76.[9] Soon thereafter, the Department began to use the new "causing false statements" theory to punish "contributions in the name of another" as felonies.[10]

The first court of appeals to review "causing false statements" to the FEC scrutinized the "knowing and willful" standard required under 18 U.S.C. §§ 2(b) and 1001. *United States v. Curran*, 20 F.3d 560, 567-69 (3d Cir. 1994). Following this Court's precedent in analogous contexts (where an ordinary person is charged with violating a complex regulatory scheme), the Third Circuit outlined the proper charge for willfulness in the federal election law context: "the prosecution [is required] to prove that defendant knew of the treasurers' reporting obligations, that

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[9] According to the Department, a campaign contributor "who wishes to give an excessively large sum to a federal candidate . . . usually employs conduits to pose as contributors." 1988 Manual, at 76. This conduct causes the campaign treasurer, who receives checks from the conduit contributors to report contributions to the FEC from the conduits themselves, as opposed to the true source of the funds. Thus, in the Department's view, the source of the funds "willfully caused" false information to be filed with the FEC. 1988 Manual, at 76. This is essentially the theory employed in this and other "causing false statements" prosecutions.

[10] *See United States v. Curran*, 20 F.3d 560 (3d Cir. 1994); *United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990); *United States v. Goland*, 897 F.2d 405 (9th Cir. 1990); *United States v. Ballori*, No. 91-0607 (E.D.N.Y.) (Indictment Jun. 6, 1991).

he attempted to frustrate those obligations, and that he knew his conduct was unlawful." *Id.* at 569.

The Proceedings in this Case

1. The Indictment

On February 18, 1998, the Campaign Financing Task Force, created in late 1996 to investigate alleged fundraising violations during that election cycle, issued its first indictment against Petitioner. The indictment alleged six felonies based on her solicitation of campaign contributions, which included one conspiracy count and five counts of violating FECA's prohibition against contributions in the name of another brought under 18 U.S.C. §§ 2(b) and 1001 (the "causing false statements" counts).[11] The Task Force overlooked the specific misdemeanor penalty for contributions in the name of another that Congress envisioned in Title 2. 2 U.S.C. § 441f.[12]

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11 The indictment charged that Petitioner "knowingly and willfully caused the submission of [ ] material false statement[s] to the FEC" because she caused federal political committees to file reports with the FEC that listed individuals who "were not the actual contributors" or when she "knew . . . the contributions had been made by [the International Buddhist Progress Society]." (R. 1, at ¶¶ 10, 13, 18, 24, 31.) The conspiracy count, brought under 18 U.S.C. § 371, was later dismissed on the government's motion. (R. 185.)

12 Following Petitioner's indictment, the Task Force brought nineteen other indictments and informations utilizing the "causing false statements" theory based solely on "contributions in the name of another." *See, e.g., United States v. Jiminez*, Crim. No. 99-00281 (S.D. Fla.) (Indictment Apr. 15, 1999); *United States v. Haney*, Crim. No. 98-0383 (D.D.C.) (Indictment Nov. 4, 1998); *United States v. Trie*, 21 F. Supp. 2d 7 (1998).

2. The District Court Decision

The district court, relying on the Third Circuit's decision in *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994) and its prior holding in *United States v. Trie*, 21 F. Supp. 2d 7 (D.D.C. 1998), dismissed all of the "causing false statements" counts pre-trial on Petitioner's motion. (App. 88a-89a.) The district court explained its standard for "willfulness" under § 2(b) in this context:

> when a contributor is charged as an aider and abettor in the federal election context for causing an intermediary to make a false statement to the FEC, the prosecution must prove that 'defendant knew of the [political party] treasurers' reporting obligations, that he attempted to frustrate those obligations, and that he knew his conduct was unlawful.'

United States v. Hsia, 24 F. Supp. 2d 14, 21 (D.D.C. 1998), quoting *Curran*, 20 F.3d at 569; *Trie*, 21 F. Supp. 2d at 14. Based on this standard, the district court held that the indictment did not allege facts sufficient to meet this level of intent.

3. Interlocutory Appeal

The government appealed, and the court of appeals reversed. (App. 22a.) The court held that the Third Circuit had gone "too far" in requiring specific intent in the federal election law context and that its sister circuit had misinterpreted this Court's precedents. (App. 12a.) The court explained that the natural reading of Sections 2(b) and 1001 required only that the government prove "(1) that the defendant knew that the statements to be made were false (the mens rea for the underlying offense--§ 1001) and (2) that the defendant intentionally caused such statements to be

made by another (the additional mens rea for § 2(b))." (App. 11a-12a.)

The court of appeals also held that the First Amendment was in no way implicated by the indictment (App. 18a), and rejected the view, adhered to by the FEC and the Department of Justice for the first dozen years of FECA's existence, that FECA's reticulated statutory regime provides the exclusive means of prosecuting FECA contribution violations. (App. 18a-20a.) Accordingly, the court rejected the claim that a prosecution for a FECA violation must utilize FECA's enforcement procedures and may not proceed under 18 U.S.C. §§ 2(b) and 1001.

4. On Remand

Following the appellate court's decision but prior to trial, the government dismissed the conspiracy count on its own motion. Thus, Petitioner was tried on a different indictment than the one reviewed by the court of appeals.[13]

At the conclusion of the evidence presented, the district court instructed the jury according to its interpretation of *Hsia I*. The district court stated: "The first two elements are that a political committee treasurer must have made a false statement or representation to the FEC and that the defendant must have known that the statement or representation was false." (App. 99a-100a.) Thereafter, the

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13 Although the court of appeals assumed the conspiracy facts alleged in the indictment for purposes of reviewing the indictment on sufficiency grounds—specifically, that Petitioner participated in a scheme to conceal the true source of the funds—these facts were not proven at trial. Petitioner was tried on the five "causing false statements" counts alone.

district court instructed: "The government is not required [ ] to prove that the defendant knew of the specific reporting requirements or prohibitions of the FEC or that she new whether conduit contributions were specifically prohibited. But the Government must prove beyond a reasonable doubt that she knowingly and willfully caused false statements to be made." (App. 100a.)

Nowhere in the court's instructions were the jurors told that Petitioner had to know that statements would be made *or* that they would be false.[14] Furthermore, the issue of Petitioner's knowledge was not only omitted from the jury instructions, but the jurors were instructed explicitly to ignore whether she knew that false statements would be made. Thus, even if the jurors were unsure about what Petitioner knew, they were told that her knowledge was irrelevant to their deliberations.

5. The Court of Appeals Decision

The court declined to overrule its prior holding, or remand to the district court in light of the erroneous instructions.[15] Instead, the court held that because Petitioner failed to raise the specific jury instructions at issue in her

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14 Instead, the district court's instructions put the onus of knowledge of statement on the campaign committee treasurers who filed the false reports with the FEC.

15 One judge expressed his amazement at how far the *Hsia I* holding had been stretched by the district court's jury instructions, exclaiming that it looked like Petitioner was convicted based on a statute that imposed strict liability. (App. 141a-147a.)

opening brief, the court would not reach the issue.[16] (App. 4a).

The court of appeals' failure to reverse for consideration of whether Petitioner's actions were "knowing" and "willful" deepened the split with the Third Circuit regarding the level of intent necessary to cause false statements to a federal agency in the complex election law regime.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve the Square Split in the Circuits Regarding the Meaning of "Willfulness" in the FECA Context

This Court should grant certiorari to resolve the direct and irreconcilable conflict between the decisions of the court of appeals in this case and the Third Circuit in *Curran*.

The Third Circuit in *Curran* defined the requisite intent for conviction when § 2(b) is brought in tandem with § 1001 in the context of causing false statements to the FEC. Because, in such cases, (1) defendants have no duty to disclose anything to the FEC; (2) the underlying conduct is

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16 Especially in light of the court of appeals' inability to comprehend how Petitioner could have caused false statements without knowing the regulations imposed by FECA, it erred in not reversing for consideration of whether Petitioner possessed the requisite knowledge for conviction based on plain error. *See Screws v. United States*, 325 U.S. 91, 106 (1945) (noting that an exception exists to the rule that generally no note is taken to issues not raised where "the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest").

not obviously "evil" or inherently "bad"; and (3) the conduct at issue is made illegal only by statute, the Third Circuit held that "willfully" requires proof that defendant knew of the committee treasurers' reporting obligations, attempted to frustrate those obligations, and knew the acts were illegal. *Curran*, 20 F.3d at 569.

The Third Circuit analogized the complex federal election laws to the currency reporting statutes and defined "willful causation" under §§ 2(b) and 1001 pursuant to the standard articulated by this Court in *Ratzlaf v. United States*, 510 U.S. 135 (1994). But here, the court of appeals explicitly rejected the Third Circuit's standard for "willfulness." It concluded that the Third Circuit defined willfully too broadly and held that § 2(b) only required that "the defendant intentionally cause[ ] such statements to be made by another." (App. 12a.)

The decision of the court of appeals is erroneous, conflicting not only with the Third Circuit but also with this Court's precedent holding that "willfulness" in the context of criminal liability for violations of complex federal regulations requires knowledge of illegality. *See, e.g.*, *Ratzlaf*, 510 U.S. 135, 149 (1994) (currency reporting); *Cheek v. United States*, 498 U.S. 192, 201 (1991) (criminal tax laws); *Liparota v. United States*, 471 U.S. 419, 433-34 (1985) (food stamp regulations). Especially in such cases where no bad purpose can be articulated, and a complex regulatory scheme is involved, this Court should hold that the government must prove that the defendant knew that her

actions were illegal to find the requisite state of mind and avoid trapping the unwary. [17]

Furthermore, the proper context for interpreting "willfulness" when a "causing false statements" charge is founded on a FECA violation should be FECA. The underlying political activity alleged here—activity fully regulated by precisely drawn statutes—involves the solicitation of campaign contributions for candidates and political parties. Such activity is at the heart of important First Amendment protections. As the Department itself once confirmed, "[t]here is nothing inherently wrongful" or "socially deviant" about the conduct proscribed by FECA. 1980 Manual, at 30. In fact, FECA proscribes activity "that would not strike an ordinary citizen as immoral or likely unlawful." *United States v. Aversa*, 984 F.2d 493, 502 (1st Cir. 1993), *vacated sub nom. Donovan v. United States*, 510 U.S. 1969 (1994). In the case of "contributions in the name of another," this is particularly true: many such contributions

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17 *See also Bryan v. United States*, 524 U.S. 184, 195 n.22 (1998). In *Bryan*, the Court quoted with approval then-Judge Breyer's view of the "knowledge of the law" requirement in certain prosecutions:

> Both sets of laws [the tax and the currency structuring laws] are technical; and both sets of laws sometimes criminalize conduct that would not strike an ordinary citizen as immoral or likely unlawful. Thus, both sets of laws may lead to the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally.

Id. at 195 n.22, quoting *United States v. Aversa*, 984 F.2d 493, 502 (1st Cir. 1993) (Breyer, C. J., concurring), *vacated sub nom., Donovan v. United States*, 510 U.S. 1069 (1994).

are not proscribed by FECA,[18] and even those plainly subject to FECA's prohibition often involve innocent acts that would not put one on inherent notice of a possible criminal violation.

Clearly, Petitioner's acts, like all political activity regulated by FECA, are not "so obviously 'evil' or inherently 'bad,'" *Ratzlaf*, 510 U.S. at 146, (particularly where, as here, the statute does not impose any disclosure obligation on solicitors or contributors), *see Republican Nat'l Comm. v. Federal Election Comm'n*, 76 F.3d 400, 406 (D.C. Cir. 1996)[19] that the willfulness element is satisfied

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18 For example, FECA does not prohibit "soft money" "contributions in the name of another," and FECA and its regulations specifically provide for several instances in which such contributions are legitimate. *See* 2 U.S.C. § 441a(a)(8); 11 C.F.R. § 110.1(i)(2)(i) (1999).

19 FECA placed responsibility on political committee treasurers to file lengthy and complex reports with the FEC. *See Buckley v. Valeo*, 424 U.S. 1, 62-63 (1976). Because of the "difficulties inherent in filing absolutely accurate reports of expenditures and contributions," Congress "contemplated" only that candidates and committees would make every effort to provide as precise an estimate as possible. S. Rep. No. 92-229, at 68 (1971), *reprinted in* 1972 U.S.C.C.A.N. 1834. After *Buckley*, Congress determined that the treasurers need only meet a "best efforts" standard of conduct to be considered in compliance with the Act. This "anti-nit-picking" amendment was "crucial since contributor information is voluntarily supplied by persons who are not under the control of the committee." H.R. Rep. No. 96-422, at 14 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2874.

regardless of a defendant's knowledge of the specific laws in question.[20]

Failure to adopt the Third Circuit's definition of willfulness risks unfairly ensnaring individuals in criminal liability for unknowing violations of technical regulatory provisions. To avoid precisely that result, Congress explicitly stated that it intended that *all* FECA violations, including contributions in the name of another, be criminalized *only if* committed with "knowledge of all the relevant facts and a recognition that the action is prohibited by law." H.R. Rep. No. 94-917, at 4. The use of 18 U.S.C. §§ 2(b) and 1001 as a means of dispensing with FECA's First Amendment-sensitive intent requirement, something the court below accepted, flies in the face of the holdings in *Ratzlaf* and *Cheek*, is inconsistent with the Third Circuit in *Curran*, and should not be condoned by this Court.[21]

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20 Petitioner's case highlights the importance of a rigorous interpretation of willfulness. The district court concluded that it was:

> difficult, if not impossible, . . . to imagine . . . that Ms. Hsia knew, at the time that she took whatever acts exposed her to Sections 1001 and 2(b) liability, that under the complex reporting scheme imposed on political committees, the listing of a name from a check might be deemed a 'false statement' and that her solicitations might 'cause' the political committees to make those false statements.

App. 84a n.32.

21 Even outside the FECA context, the court of appeals' decision is problematic. In *Bryan*, this Court held that the terms "knowing" and "willful" are not synonymous, redundant words. "[U]nless the text of the statute dictates a different result," the Court said, "the term

Continued on following page

II. This Court Should Articulate the Proper Test for Knowledge and Willfulness under §§ 2(b) and 1001 in the Election Law Context

Even if this Court finds that knowledge of illegality is not required with respect to a complex First Amendment-sensitive regulatory scheme, Petitioner's convictions cannot stand where Petitioner's knowledge of the facts was not submitted to the jury. *See Liparota v. United States*, 471 U.S. 419, 433-34 (1985).[22] To have knowledge here, Petitioner had to know FECA's underlying regulatory scheme. Without it, she could not have "knowingly and willfully" caused false statements under either § 1001 or the heightened standard of § 2(b) because she would not have

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Continued from previous page

'knowingly' merely requires proof of knowledge of the facts that constitute the offense." *Bryan*, 524 U.S. at 193. "Willfully" is a higher standard, requiring proof of a "culpable state of mind," "an evil-meaning mind." *Id.* at 191, 193. Thus, under *Bryan*, the court's view that Section 2(b)'s "willfulness" requirement, even coupled with Section 1001's "knowing and willful" requirement, meant only "knowing," reading out the willfulness requirement in both statutes, conflicts directly with *Bryan's* articulation of the minimum standard of proof required by the statutory term "willful."

22 The Court's opinion in *Liparota* makes clear that if knowledge of illegality is required, *then* knowledge of the specific regulations at issue might not be necessary. *Liparota*, 471 U.S. at 433-434. But where knowledge of illegality is not required *and* the jury is told not to consider whether the accused knew the specific regulations that made the conduct illegal, the effect is to read "knowingly and willfully" out of the statute altogether.

known that campaign committee treasurers would make statements in their FEC reports.[23]

But the district court instructed the jury that it did not matter whether Petitioner knew the FEC rules and regulations; in fact, it omitted from the instructions whether anyone had to know that statements would be made. Instead, the instructions *assumed* statements were made first, and then asked the jury to consider whether Petitioner knew that the statements were false. (App. 99a.)

The elements of "knowledge" and "willfulness" in the context of a complex regulatory scheme are inextricably intertwined. Petitioner could only have "intentionally" or "willfully caused" the offenses charged if she knew the FEC regulations.[24] Furthermore, because both "knowledge" and "willfulness" are required, the *Curran* standard is the only way to prevent innocent actors from being unknowingly convicted and to uphold Congress' carefully articulated enforcement scheme in this highly regulated, First Amendment-sensitive area.

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23 *See Bryan*, 524 U.S. at 192-93 (a knowing violation of a statute requires factual knowledge).

24 As the Third Circuit recently stated in a recent "willful causation" challenge under Section 2(b) in the context of the causing a false claim against a federal agency, "a defendant must at least know that he is causing the intermediary to present a false claim to someone." *United States v. Gumbs*, 283 F.3d 128, 131 (3d Cir. 2002).

III. This Court Should Grant Certiorari to Resolve the Question Whether Congress Intended FECA to be the Exclusive Means of Enforcing FECA Compliance

This case also presents a threshold issue of critical importance that would resolve the split between the D.C. Circuit and the Third Circuit: whether FECA is the exclusive means of enforcing FECA compliance, thus prohibiting a prosecution of FECA violations under 18 U.S.C. §§ 2(b) and 1001 (regardless of the level of willfulness). This Court should grant certiorari because of the critical importance of this question to the administration of the only federal statute intended to regulate the First Amendment-sensitive area of campaign financing.

In analogous situations, the Court has not hesitated to conclude that, in light of congressional intent, broad, general criminal statutes do not apply to an area specifically and comprehensively regulated by a targeted statute. *See, e.g.*, *Dowling v. United States,* 473 U.S. 207 (1985) (National Stolen Property Act did not apply to bootleg phonorecords regulated by the Copyright Act); *United States v. Enmons*, 410 U.S. 396 (1973) (Hobbs Act did not apply to the use of violence to achieve legitimate union objectives fully regulated by the labor laws); *see also United States v. Boffa,* 688 F.2d 919, 928-929 (3d Cir. 1982), *aff'd*, 723 F.2d 899 (3d Cir. 1983) (rejecting mail fraud prosecution grounded on unfair labor practices where conduct was regulated exclusively under the National Labor Relations Act); *United States v. Delaurentis*, 491 F.2d 208, 214 (2d Cir. 1974) (rejecting application of the Civil Rights Act to conduct covered by the National Labor Relations Act).

Indeed, in considering the intersection of different statutory regimes, the Court has recognized repeatedly that

an examination of congressional intent regarding the most recent relevant enactments defines the scope of an earlier enactment and the relationship between the two. *See e.g.*, *NLRB v. Drivers Local Union*, 362 U.S. 274, 291-92 (1960) ("Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit.");[25] *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967); *see also Pipefitters Local Union v. United States*, 407 U.S. 385, 412 (1972) (considering 1971 FECA in construing 18 U.S.C. § 610 and concluding that FECA helped "'throw a cross light' on the earlier enactment") (citation omitted); *United States v. Johnson*, 390 U.S. 563, 564-66 (1968) (examining legislative history of Civil Rights Act of 1964 to determine whether prosecution to deprive individuals of rights guaranteed by that Act was permissible under federal conspiracy statute originally derived from the Enforcement Act of 1870.)

FECA and Congress' intent as expressed therein should determine whether 18 U.S.C. §§ 2(b) and 1001 may be used to enforce alleged violations of FECA's prohibition on contributions in the name of another. FECA is a comprehensive regulatory scheme that simplified and rationalized the enforcement of the federal election laws in light of First Amendment concerns. As then-Judge Ginsburg wrote in *Galliano v. United States Postal Service*, 836 F.2d 1362, 1370 (D.C. Cir. 1988), "[a] fine balance of interests was deliberately struck by Congress" in FECA's "first-

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25 In *Drivers Local Union*, the Court considered the sensitivity of the area of peaceful picketing, the Labor Board's own decade-old interpretation of the Act, and the goal of Congress to establish a coherent and comprehensive labor policy in the NLRA. 362 U.S. at 284, 291.

amendment-sensitive . . . substantive" provisions and its "first-amendment-prompted arrangements . . . for FECA enforcement actions."[26]

With the First Amendment in mind, Congress fully considered the extent of regulation permissible for political committee disclosure reports and contributions, including contributions made in the name of another, and provided an intent-based, graded enforcement and penalty scheme that must be utilized for *all* FECA violations. Congress specifically rejected felony punishment for fundraising violations, never contemplating that contributors or solicitors would be subject to criminal liability by operation of the combination of two statutes that on their face did not apply and never before had been applied in the context of federal election fundraising. In fact, "contributions in the name of another" were not prosecuted as "causing false statements" for twelve years following FECA's post-*Buckley* amendments. "It is unlikely that if Congress" intended the causing false statement statutes to apply, "its action would have so long passed unobserved."[27] *Enmons*, 410 U.S. at 410.

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26 In *Galliano*, the D.C. Circuit held that the general provisions of the postal false statements statute did not apply to FECA-regulated activities. 836 F.2d at 1370-71.

27 Had Congress wished or intended to create a "false statement" when it proscribed "contributions in the name of another," it could have done so, utilizing language similar to that which it has used in many other misdemeanor false statement statutes. *See, e.g., United States v. Hansen*, 772 F.2d 940, 945-47 (D.C. Cir. 1985). Indeed, Congress specifically addressed the extent to which 18 U.S.C. § 1001 was relevant to FECA, confirming that it applied when a false complaint alleging a violation of the Act was filed with the FEC. (App. 164a.)

FECA demonstrates a "good deal of care on Congress' part," which suggests the "indirect but blunderbuss solution" offered by this indictment should not supplant "a problem treated with precision [by Congress]." *Dowling*, 473 U.S. at 226. Indeed, it is "implausible to suppose Congress intended to combat" campaign finance violations "by the circuitous route hypothesized" by this case. *Id.* at 221. The "discrepancy between the two approaches" suggests that "Congress had no intention to reach" FECA violations through the causing false statements approach. *Id.* at 226. In FECA, "Congress intended to regulate all aspects of federal campaign finances," to fully occupy the field, for "the whole of this Act is greater than the sum of its parts." *Buckley v. Valeo*, 424 U.S. 1, 235-36 (1976) (Burger, C.J., concurring in part and dissenting in part).

This Court has always recognized the "delicate and vulnerable" nature of the First Amendment freedoms, which are "supremely precious in our society." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Thus, where a statute reaches expression protected by the First Amendment, the Court "demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. 566, 573 (1974). The Court has subjected limitations on political contributions and expenditures, as well as campaign disclosure requirements, to strict scrutiny to ensure that the government's interest in regulating the activity outweighs the burden on the First Amendment. *See Buckley*, 424 U.S. at 45, 64-68. "The formula for strict scrutiny is . . . well established. It requires both a compelling governmental interest and legislative means narrowly tailored to serve that interest." *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 611 (1996) (Thomas, J., dissenting); *Buckley*, 424 U.S. at 25.

The broad "causing false statements" statutes at issue—and the effort to graft them onto a FECA-prohibited "contribution in the name of another"—cannot survive strict, or even close, scrutiny. There is no compelling governmental interest that would justify the statutes' use that has not already been addressed by the far less restrictive alternative enacted by Congress in FECA itself, a carefully crafted regime specifically designed for regulating the First Amendment-sensitive area of campaign financing.

In an earlier FECA case, this Court observed that the government's "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one." *Colorado Republican Federal Campaign Comm.*, 518 U.S. at 621. Here too, the Department cannot avoid the application of constitutionally mandated First Amendment protections, which require that the government regulate in this area via a narrowly drawn statute tailored to serve a compelling government interest, by the simple exigency of labeling the speech in question "false." "Mere labels" contain "no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Both as a matter of congressional intent and constitutional command, FECA's enforcement provisions are the exclusive means of enforcing FECA's requirements.

IV. The Important Questions Raised by the Petition Are Frequently Recurring

The issues presented here will have continuing future consequences in every case involving "contributions in the name of another," whether brought by the FEC or by the Department. Only an opinion from this Court will bring about uniformity of decisions on these matters, providing

certainty in a First Amendment-sensitive area, and laying to rest fundamental issues of constitutional law and statutory interpretation.

The issue of the level of intent that must be proved in a "causing false statements" prosecution based on FECA-regulated political activity has been clearly, fully, and specifically joined by the divergent views of the D.C. and the Third Circuit courts of appeals. That question, as well as the broader issue whether the "causing false statement" statutes may be used at all to regulate political activity already subject to FECA, would not benefit from further study in the lower courts and can only be resolved by this Court.

While delay in addressing these issues would serve no purpose, it clearly would undermine and impair the rational, orderly administration of FECA, a particularly troubling result when First Amendment activity is subject to severe criminal sanctions. The very conduct alleged here, if prosecuted under FECA, would require a *higher* level of intent for a *misdemeanor* than the trial of the same FECA-prohibited conduct in the guise of a "causing false statement's" *felony* prosecution. Even a civil remedy pursued by the FEC, involving precisely the same conduct, would have a different, *higher*, intent standard than that approved by the D.C. Circuit below for this convoluted felony prosecution. This gross disparity is contrary to Congress' expressed intent in FECA; it distorts FECA's carefully calibrated enforcement scheme by removing one activity, contributions "in the name of another," from FECA's finely tuned regime and using it as a vehicle for a "causing false statements" prosecution.

The "causing false statements" approach, if allowed to continue, will lead to other incongruous results. For example, Congress provided a jurisdictional monetary floor

before the most severe punishment, the misdemeanor penalty, could be considered for a knowing and willful contribution in the name of another; yet the Department avoids that floor when it brings a "causing false statements" indictment. And, Congress provided a three-year statute of limitations for FECA violations; the Department avoids that limit when it brings a "causing false statements" case grounded on political "contributions in the name of another."

These are significant concerns, affecting many pending and future cases. Of the hundreds of alleged "contributions in the name of another" to political candidates reviewed over the last twenty years, the FEC has pursued the vast majority administratively, utilizing the higher standard of intent proscribed by Congress for the most serious violations. In contrast, since its formation in late 1996, the Campaign Financing Task Force has brought nineteen multi-count felony indictments, more than half of which involve allegations that the defendant "caused false statements" (or "conspired" to do so) by participating in "contributions in the name of another." Some of those cases are still pending, and the Task Force is actively proceeding with numerous other far-reaching investigations which, undoubtedly, will lead to further "causing false statement" prosecutions cobbled onto what is actually, at worst, a violation of FECA's prohibition of contributions in the name of another.

In addition to the direct harm suffered by those subjected to "causing false statements" prosecutions, society, which considers First Amendment freedoms among the "'most precious,'" *Buckley*, 424 U.S. at 41 (citation omitted), suffers as well, making it vital that the Court consider the issues presented in this petition. Where First Amendment concerns are implicated, the Court has recognized that "'(p)recision of regulation'" is the "touchstone," *id.*;

otherwise, vague or broad criminal laws may induce "citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'" *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (citations omitted). Indeed, "[t]he loss of First Amendment freedoms, for even minimal periods of time," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), whether by direct government action or through statutes which cause "citizens to 'steer far wider of the unlawful zone,'" *Grayned*, 408 U.S. at 109 (citation omitted), constitutes irreparable injury which is particularly acute in matters involving political speech and association, as "[t]he timeliness of political speech is" critical. *Elrod*, 427 U.S. at 374, n.29 (1976).[28] The effect of the court of appeals decision—criminal liability without knowledge of unlawfulness in a thicket of complex regulations—will be a powerful disincentive to active participation in political campaigns. To avoid this chill, it is vital that the Court promptly address the issues raised in this Petition.

In sum, the arguments for certiorari here are particularly compelling in light of the square split in the circuits; the importance of the issues; the chilling threat to core First Amendment values; and the disruption of Congress' carefully calibrated FECA regime. The issues are fundamental and recurring, and warrant this Court's review.

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[28] *See also Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329-30 (1975) (restriction on news media's pretrial coverage constitutes irreparable injury); *Carroll v. President & Com'rs of Princess Anne*, 393 U.S. 175, 182 (1968) ("'It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances.'") (citations omitted).

CONCLUSION

For the foregoing reasons, Petitioner Maria Hsia respectfully requests that the Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

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May 2002

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-3013 **September Term, 2001**
(98cr00057-01)

United States of America,
Appellee **Filed On: Dec. 11, 2001**

v.

Maria Hsia, a/k/a Hsia Ling,
Appellant

Appeal from the United States District Court
for the District of Columbia

Before: EDWARDS & ROGERS, Circuit Judges, and
WILLIAMS, Senior Circuit Judge.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and the oral argument of the parties. The court has determined that the issues presented occasion no need for a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons stated in the accompanying memorandum, it is

ORDERED AND ADJUDGED that the judgment of conviction is affirmed on all counts.

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: _____
Michael C. McGrail
Deputy Clerk

MEMORANDUM

Maria Hsia appeals her conviction by a jury for multiple violations of 18 U.S.C. §§ 1001 and 2(b). To the extent she challenges the sufficiency of the evidence, her challenge fails. *See United States v. Wilson*, 160 F.3d 732, 736-37 (D.C. Cir. 1998). Although Hsia appears to argue that the Federal Election Commission ("FEC") reports (Form 3P Schedule A) that were filed were not false statements but only showed receipts instead of true sources of contributions (or at least purported truce sources of contributions), such a position is contrary to the basic elements of the statutory reporting scheme. *See* 2 U.S.C. §§ 431(8)(A)(i), 434(b)(3), 441a(a)(8), and 441f; *United States v. Hsia*, 176 F.3d 517, 521-24 (D.C. Cir. 1999) ("*Hsia I*"). The district court did not err in declining to adopt Hsia's view of the government's evidence regarding the FEC reports. Accordingly, the district court did not err in denying Hsia's motion for judgment of acquittal, *see* Fed R. Crim. P. 29.

Consistent with 18 U.S.C. § 434(b)(3), *see Hsia I*, 176 F.3d at 524, the district court did not err in ruling that there was sufficient evidence of the falsity of the relevant entries with respect to the true source of the money behind each conduit contribution listed in the FEC reports: Count 1 (Yeh), Count 2 (Xu), and Counts 3-5 (Temple). Viewing the evidence as we must in the light most favorable to the government, *Wilson*, 160 F.3d at 736-37, the government showed that false statements were made by introducing into evidence portions of the relevant FEC reports and offering circumstantial evidence from which the jury could reasonably find that the reports were understood to constitute statements of the names of non-conduit contributors to various political campaigns. In addition, the evidence of knowing and intentional submission of conduit checks without providing information about the true source of the contributions, such that the jury could reasonably find that

Hsia knew that the reports to be submitted were false, suffices to show causation. Because Hsia did not properly raise on appeal claims about jury instructions on the required finding of her knowledge of reporting requirements, this court cannot disturb the jury's finding that this causation of false reports being filed was willful. *See id.* at 522-23. Further, the government offered evidence from which a reasonable jury could find that Hsia directly solicited conduit checks charged in Counts 1, 2, and 5, and knowingly obtained such checks charged in Counts 3 and 4, and in each instance handed the conduit checks to the political committee representative.

Hsia's claims of instructional error likewise fail. The district court instructed the jury that "the courts have interpreted these provisions of FECA [the Federal Election Campaign Act] to require political action committees to report the true source of the contributions." This is a correct statement of the law, *see id.* at 524-25, and did not withdraw any factual determinations from the jury. Hsia's only other claim of instructional error regarding this instruction on concealment also fails; not only did she fail to make this argument in her opening brief, *see Croson & Gruman Co. v. NLRB*, 899 F.2d 47, 50 n. 4 (D.C. Cir. 1990), the district court altered its original instruction to accommodate Hsia's concerns. Because Hsia did not argue in her opening brief that the district court's instructions to the jury failed to conform with *Hsia I*, 176 F.3d at 522, insofar as the jury was instructed that it did not have to find that Hsia was aware of a reporting requirement, we do not reach that issue.

Hsia's other claims of error warrant only brief comment. First, to prove that Hsia knowingly caused false statements to be made under § 1001, the government had to show that she did not disclose to the political committee representative either what she was doing or the true source of the contribution. In submitting such proof, the government did not constructively amend the indictment to charge

concealment. *Cf. United States v. Mangieri*, 694 F.2d 1270, 1277 (D.C. Cir. 1982).

Second, regarding the Temple reimbursement checks, the district court found that the evidence of her acceptance of reimbursement checks in 1993 and 1996 was relevant to her knowledge and absence of mistake or accident. *See United States v. Clarke*, 24 F.3d 257-264-65 (D.C. Cir. 1994); Fed. R. Evid. 404 (b). Hsia fails to point to any impermissible bad character evidence or prejudice amounting to an abuse of discretion by the district court. *Cf. United States v. Gartmon*, 146 F.3d 1015, 1021 (D.C. Cir. 1998). The evidence regarding the Temple's reimbursement checks for 1996 was relevant to Counts 3 and 4, and the checks were not inadmissible hearsay. *See Williams v. United States*, 458 U.S. 279, 284 (1982); *United States v. Shepherd*, 739 F.2d 510, 514 (10th Cir. 1984).

Third, under Fed. R. Crim. P. 12(b), motions to sever must be made pretrial. Assuming that the need for a severance may not have been apparent pretrial, Hsia's claim of error rests on the denial of her opportunity to testify. Yet at no time did she indicate that she would testify, much less provide a proffer of her testimony. *See Baker v. United States*, 401 F.2d 958, 976-77 (D.C. Cir. 1968).

Fourth, there was no *Brady* violation with respect to the art fund purchase because Hsia was fully aware of the information, as her pretrial objections to the governments Rule 404(b) notice demonstrate. *Cf. In re Sealed Case*, 185 F.3d 887, 892-98 (D.C. Cir. 1999); *United States v. Derr*, 990 F.2d 1330, 1335-36 (D.C. Cir. 1993). Nor did this district court err in finding no *Brady* violation as to the Abbess Tzu's grand jury testimony, which was harmful to Hsia by corroborating the government's evidence and, in any event, was not exculpatory. Hsia was not charged with a solicitation offense, and thus how she approached the Temple for funds is of no consequence.

Fifth, the district court did not err in failing to: (1) advise defense counsel of an ongoing Judicial Council investigation of the chief judge of the district court; (2) issue a requested stay of the proceedings; or (3) grant a new trial on that basis. *Cf. United States v. Bayless*, 201 F.3d 116, 126-27, 129 (2d Cir. 2000); *Untied States v. Haldeman*, 559 F.2d 31 (sic), 137 (D.C. Cir. 1976). Defense counsel repeatedly stated on the record that the defense did not dispute the district court's impartiality.

Accordingly, because we hold that Hsia's challenges to her conviction are unpersuasive and that the district court did not err in denying Hsia's motion for new trial, we affirm the judgment of conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided May 18, 1999

No. 98-3114

UNITED STATES OF AMERICA,
APPELLANT/CROSS-APPELLEE

v.

MARIA HSIA,
APPELLEE/CROSS-APPELLANT

Consolidated with
No. 98-3125

Appeals from the United States District Court
for the District of Columbia
(No. 98cr00057-01)

Elizabeth D. Collery, Attorney, U.S. Department of Justice, argued the cause for appellant/cross-appellee. With her on the briefs was *Eric L. Yaffe,* Trial Attorney.

Nancy Luque and *Rangeley Wallace* argued the cause and filed the briefs for appellee/cross-appellant.

Reid H. Weingarten, William T. Hassler and *Brian M. Heberlig* were on the brief for amicus curiae Yah Lin Trie.

Before: WILLIAMS, ROGERS and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* STEPHEN F. WILLIAMS.

Concurring opinion filed by *Circuit Judge* ROGERS.

STEPHEN F. WILLIAMS, *Circuit Judge*:

A six-count indictment charged Maria Hsia with various offenses deriving from a scheme to solicit illegal political contributions and disguise them as lawful ones. Hsia filed numerous motions to dismiss. The district court denied the motions as to Count One—conspiracy to defraud the Federal Election Commission ("FEC") and the Immigration and Naturalization Service ("INS")—but dismissed Counts Two through Six—causing false statements to be made to FEC. 24 F. Supp. 2d 33, 38-47, 52-63 (D.D.C. 1998); 24 F. Supp. 2d 63, 64-65 (D.D.C. 1998). The United States appeals this dismissal; we reverse. Hsia cross appeals the refusal to dismiss Count One; we dismiss the appeal for lack of appellate jurisdiction.

* * *

The International Buddhist Progress Society ("IBPS"), one of Hsia's alleged co-conspirators and operator of the Hsi Lai Temple in Hacienda Heights, California, is a tax-exempt religious organization incorporated in California. The Federal Election Campaign Act ("FECA') forbids such a corporation from making contributions in federal election campaigns, 2 U.S.C. § 441b(a); the tax code bars participation in political campaigns whether they are federal or not, 26 U.S.C. § 501(b)(3).

Hsia herself is an immigration consultant in the Los Angeles area. The indictment alleges a series of actions taken by her and her co-conspirators to funnel money from IBPS through straw contributors into various campaigns.

Hsia would either find and solicit individuals to serve as nominal contributors, see Indictment ¶¶ 32, 35, 38, 40(hh), 40(ii), or ask IBPS to do so, *see id.* ¶¶ 17, 19, 23, 26, 28, 33, 35, 40(h), 40(k), 40(n), 40(q), 40(t), 40(z), 40(cc), 40(gg). (She sometimes employed herself as such a contributor. *See id.* ¶¶ 15, 30, 38, 40(jj).) When IBPS complied with such a request—often employing people associated with the Temple as nominal contributors, *see id.* ¶ 13(b)—Hsia sometimes forwarded the checks to the campaign. *See id.* ¶¶ 23, 33, 38, 40(kk). All nominal contributors, whether solicited by Hsia or by IBPS, were reimbursed in full by IBPS from its corporate funds. *See id.* ¶¶ 17, 19, 23, 24, 26, 28, 30, 32, 33, 35, 39, 40(g), 40(i), 40(*l*), 40(o), 40(r), 40(u), 40(x), 40(aa), 40(dd), 40(*ll*). The individuals thus simply served as conduits for IBPS's money.

Hsia also allegedly used conduits to funnel money from two of her immigration clients—Hsieh San Yeh and Zhe Xu[1]—to the Clinton/Gore '96 Primary Committee, Inc. ("Clinton/Gore '96"). In these instances she instructed others to solicit the straw donors but conveyed the checks to the committee herself. *See* Indictment ¶¶ 47-49; Bill of Particulars at 14-16.

Count One charges that the actions involving IBPS constituted a conspiracy to defraud the United States, specifically the FEC and INS, in violation of 18 U.S.C. § 371. *See* Indictment ¶ 10. Counts Two through Six charge that Hsia, by means of her conduit contribution schemes, willfully caused certain recipients of such contributions-Clinton/Gore '96, the Democratic National Committee, and The Friends of Patrick J. Kennedy '96-to make false statements to the FEC in violation of 18 U.S.C. §§ 2 and

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[1] Ms. Xu was apparently a foreign national barred from making contributions by 2 U.S.C. § 441e.

1001: these recipients filed reports listing the conduit contributions as being from their nominal sources, although the true source was either IBPS, Mr. Yeh, or Ms. Xu. See Indictment ¶¶ 43, 46, 49, 52, 55; Bill of Particulars at 14-16.

* * *

Counts Two through Six are based on 18 U.S.C. §§ 2(b), 1001(a):

Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2(b).

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
>
> . . .
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation . . . shall be fined under this title or imprisoned not more than 5 years, or both.

Id. § 1001 (a).[2]

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[2] This is the current form of § 1001, which applies only to Count Six. Counts Two through Five, alleging acts occurring before this current language went into effect, charge violations of the previous version of §1001. That stated: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully . . . makes any false, fictitious or fraudulent statements or representations . . . shall be fined under this title or imprisoned not more than five years, or both." The differences between the versions are not relevant to this case, and we will refer to the current § 1001.

The most orderly fashion for addressing the district court's decision is by the elements of willfulness, causation, and falseness, with respect to all of which it found deficiencies.

"Willfully"

According to the district court, the word "willfully" in § 2(b) requires the government to show that Hsia knew that her conduct was unlawful. 24 F. Supp. 2d at 62 n.32; 24 F. Supp. 2d 14, 21 (D.D.C. 1998) (original decision on this issue); see also *United States v. Trie*, 21 F. Supp. 2d 7, 14-16 (D.D.C. 1998).[3] Believing that the charges here required an unconventional and extreme interpretation of §§ 2(b) and 1001, the court found that Hsia could not have known that her conduct would fall within their grasp.

Although we find no material novelty in the government's reading of the statutes (see below), our decision on whether the element of willfulness is adequately alleged does not turn on this point. We believe that the government need not prove that Hsia knew her acts to be unlawful; the question whether she could in fact have had such knowledge is therefore irrelevant.

The natural reading of §§ 2(b) and 1001 is this: the government may show mens rea simply by proof (1) that the defendant knew that the statements to be made were false (the mens rea for the underlying offense—§ 1001) and

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[3] Although the district judge appeared to attribute this knowledge-of-criminality requirement to § 1001's "knowingly and willfully" language, it must, if it exists at all, be a gloss of "willfully" in § 2(b): no court adopting such a requirement has questioned the rule that knowledge of criminality need not be shown in direct § 1001 prosecutions. See *United States v. Curran*, 20 F.3d 560, 567-68 (3d Cir. 1994) (analyzing issue as § 2(b) requirement).

(2) that the defendant intentionally caused such statements to be made by another (the additional mens rea for § 2(b)). See *United States v. Gabriel,* 125 F.3d 89, 101 (2d Cir. 1997). The district court, like the Third Circuit in *United States v. Curran,* 20 F.3d 560 (3d Cir. 1994), relied on *Ratzlaf v. United States,* 510 U.S. 135 (1994), for its contrary result. But this extends *Ratzlaf* too far: that case did not universalize a broad reading of "willfully" and thus overturn the general rule that ignorance of the law is no excuse. *Ratzlaf* found a knowledge-of-criminality requirement in a statute that independently required the act at issue to be "for the purpose of evading" various reporting requirements; reading "willfully violating" there as only requiring intention would have made it surplusage. *Id.* at 139-41. In this case, no such problem exists. We find *Ratzlaf's* narrow exception inapplicable and adopt the natural reading of mens rea above. Accordingly, nothing in the indictment's allegations contradicts the government's capacity to prove the statutorily required mens rea.

"Causes"

It is not entirely clear what defects the district court found in the government's theory of causation. The initial objection—that "a check is not a statement," 24 F. Supp. 2d at 62-63—appears not only incorrect (the cases indicate, at most, that a check does not assert that it will not bounce) but irrelevant. The false statements here are the political committees' reports identifying certain listed names as sources of specific contributions; the names on the checks, together with the rest of the alleged conduit contribution scheme, could have "caused" these false statements to be made whether or not the checks were themselves statements of anything. But the district court seems also to have had a more general objection—that the causal link between Hsia's

conduct and the making of false statements was too "attenuated." *Id.* at 61-62.

Section 2(b) does not, of course, limit by its terms the particular means by which the defendant may "cause" another to commit the act, nor the degree of permissible "attenuation" between these two people's actions. Cf., e.g., *United States v. West Indies Transp., Inc.*, 127 F.3d 299, 307 (3d Cir. 1997) (defendant may be prosecuted under §§ 2(b) and 1001 even if people who actually made false statements are not criminally liable). The mens rea element of the statute provides an outer limit on the latter, for a weak or implausible causal link would make it more difficult to prove that the defendant brought the effect about "willfully."

Nor is the general scheme of the indictment novel; the application of § 2(b) to a conduit contribution scheme has been several times upheld. *See Curran*, 20 F.3d 560; *United States v. Hopkins*, 916 F.2d 207 (5th Cir. *1990); Goland v. United States*, 903 F.2d 1247 (9th Cir. 1990); cf. *United States v. Yermian*, 468 U.S. 63, 68-75 (1984) (§ 1001 conviction requires no proof that defendant was aware of any federal agency jurisdiction). In those cases, defendants were convicted under §§ 2(b) and 1001 for employing such a scheme to conceal their own contributions: they had found nominal donors, had these conduits make payments to a committee, and reimbursed them. Here, the money was not Hsia's; it belonged instead to her immigration clients or to her co-conspirator IBPS. But Hsia arranged—directly or indirectly—for the conduits to do their part. That she did this to channel *others'* money does not help her. As FEC regulations direct committees to report "any contribution made by check, money order, or other written instrument" "as a contribution by the last person signing the instrument" [a]bsent evidence to the contrary," 11 CFR § 104.8(c), the simple interposition of conduits to sign the checks is

certainly enough to "cause" a committee to make false statements in its report. The indictment and bill of particulars straightforwardly lay out the government's account of Hsia's affirmative steps toward that result.

Invocation of the due process clause or the First Amendment does not change the analysis, at least for review of the indictment. As the case fits comfortably within the clear and previously accepted scope of §§ 2(b) and 1001, there is no question of notice or vagueness. As for overbreadth, we do not understand how it might apply here. There is no suggestion that the statutes are facially invalid. While the absence of any claim that Hsia's activity was itself constitutionally protected is consonant with the general form of overbreadth standing, see *Board of Trustees v. Fox*, 492 U.S. 469, 484 (1989), neither Hsia nor the district court ever specified just what protected activity could be chilled by the application of §§ 2(b) and 1001 to this case. "Overbreadth" appears, at bottom, to have been another tag for the court's concern that the indictment stretched §§ 2(b) and 1001 unreasonably far. We see no constitutional difficulty in use of the statutes against the conduct alleged here.

"False"

The final strand of the district court's reasoning was its suggestion that the statements at issue were "literally true." 24 F. Supp. 2d 33, 58.

FECA requires that political committees file periodic reports containing, among other things, the identification of each –

(A) person . . . who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or

value in excess of $200 within the calendar year . . . together with the date and amount of any such contribution.

2 U.S.C. § 434(b)(3). "Contribution" is defined, in relevant part, as

> any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.

Id. § 431(8)(A)(i). FECA also provides that

> For purposes of the limitations [on contributions and expenditures] imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

Id. § 441a(a)(8). Finally, FECA specifically states:

> No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

Id. § 441f.

We are convinced by these latter provisions that § 434(b)(3)'s demand for identification of the "person . . . who makes a contribution" is *not* a demand for a report on the person in whose name money is given; it refers to the true source of the money. As the committees here did not report the true sources, their statements would appear to be false.

The district court, for the most part, appears to have agreed with this analysis. See 24 F. Supp. 2d at 59-60. It determined, however, that FECA's safe harbor provision, 2 U.S.C. § 432(i), controlled the case. That subsection, added five years after FECA's original enactment, states:

> When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act.

Id. Because the indictment does not allege that the committee treasurers had any wrongful knowledge, the district court found, the statements in the reports must be considered FECA-compliant (and therefore not false). 24 F. Supp. 2d at 60-61.

The argument assumes that this safe harbor does not merely provide an affirmative defense for the committee and its officers but actually modifies the substantive reporting requirements of FECA. Even if the provision wrought some substantive amendment, however, it could not be so drastic as to aid Hsia here. Section 432(i) conditions its relief on the treasurer's making "best efforts" to ascertain the necessary information, and FEC has spelled such efforts out in 11 C.F.R. § 104.7. But not even Hsia argues that the section would shield a treasurer who went through the motions of

the "best efforts" and then submitted information contrary to facts known to her. Thus, if the act of filing the report with conduits listed as contributors were "directly performed by" Hsia, 18 U.S.C. § 2(b), her actual knowledge of falsity—required to be shown anyway—would make the statements culpable regardless of any ritualistic performance of "best efforts."

In any event, we find no substantive modification. The statute allows the safe harbor only when the treasurer "shows" the use of best efforts, suggesting that the provision only applies to a proceeding against the committee itself or one in a position to make such efforts on the committee's behalf. 2 U.S.C. § 432(i). Further, there remains no qualifying language in the actual reporting requirements, and indeed § 432(i) refers to "the information required by this Act." *Id.* Finally, it would make no sense for Congress to allow treasurers to rely on the provision of information by others while at the same time giving others a virtual carte blanche to provide inaccurate information. We believe § 432(i) does not benefit those not associated with the committee at issue.

On appeal, amicus Yah Lin ("Charlie") Trie presents an alternate theory of truth. Trie relies on the FEC forms themselves, claiming that they did not request identification of the actual source of the money. This argument might make some sense if the forms employed terms other than those of the statute itself, but they do not. Schedule A—the list of names at issue—is simply an itemized list of "Contributions (other than loans) From [ ] Individuals/Persons Other Than Political Committees." This, like the rest of the form, simply echoes and implements the language of § 434(b)—a subsection which, as we have noted above, requires that the true source of money be reported.

We thus reject all arguments that the statements alleged in the indictment were "literally true".[4]

* * *

Although Hsia conclusorily restates the theories adopted by the district court, most of her briefs are devoted to alternate theories for affirming the dismissal.

Hsia's initial claims are all of First Amendment protection. Her free exercise arguments (asserted on behalf of IBPS and its members) we can dismiss immediately: these are—at most—a basis for a defense at trial, not a legal deficiency in the indictment. Her free speech argument appears to be this: since Hsia was simply soliciting political contributions, her actions here were protected speech; therefore the indictment must be subject to strict scrutiny.

This misframes the issue. The only solicitations alleged are those of *conduit* contributions and of nominal "contributions" from the conduits themselves. Neither is protected. FECA's reporting requirements were upheld by the Supreme Court. *See Buckley v. Valeo,* 424 U.S. 1, 60-68 (1976). Hsia has not suggested any plausible grounds for a right to tamper with these reports. *Cf.*, e.g., *Goland,* 903 F.2d at 1258 (rejecting as frivolous defendant's asserted right to contribute anonymously via conduits).

Finally, turning to Hsia's argument that FECA constitutes a pro tanto repeal of §§ 2 and 1001, we agree with the district court that it does not.

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[4] We also reject Trie's contention, based on his same theory, that the counts must be dismissed because the FEC forms were "fundamentally ambiguous." Read in context, the forms have no such defect.

We work in these cases under a presumption against repeal by implication. In *United States v. Hansen,* 772 F.2d 940 (D.C. Cir. 1985), rejecting an argument that the financial disclosure requirements of the Ethics in Government Act effected a pro tanto repeal of § 1001, we said that the presumption rests on the view "that Congress legislate[s] with knowledge of former related statutes, . . . and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the uncertainties of implication compounded by the vagaries of judicial construction." *Id.* at 944–45 (internal quotation omitted). Thus we will not find repeal absent "clear and manifest" evidence that it was intended. *Id.* at 947–48.

Hsia presents no evidence of this sort. Instead, she relies on our decision in *Galliano v. United States Postal Service,* 836 F.2d 1362 (D.C. Cir. 1988). There the Postal Service, exercising its administrative power under the general postal fraud provisions of 39 U.S.C. § 3005, had attacked as misleading the name and disclaimers on a solicitation for political contributions. To the extent FECA set out standards for these elements of such a solicitation, we held, it displaced the Service's authority under § 3005.

Hsia reads the case broadly, as indicating that FECA generally displaces more general statutes. Like the district court, we disagree. *Galliano* concerned the relative scope of jurisdiction for two administrative agencies—FEC and the Postal Service. The Department of Justice's authority to enforce general criminal statutes is quite different.[5]

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[5] *Galliano* did not purport to disturb the long-recognized rule that the power of the Department to prosecute criminal violations is not displaced merely by the fact of a more focused later enactment, see *Hansen,* 772 F.2d at 945-46 (citing cases)—a corollary to the rule that where various criminal prohibitions intersect, a prosecutor may

Unlike the Postal Service, the Department of Justice has no authority to develop substantive standards of its own. As a criminal enforcer, it brings cases in federal court, where judges interpret the underlying statutes without deference to the Department. See *Crandon v. United States,* 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring). There is, therefore, no risk that Congress might have empowered two bodies to promulgate conflicting substantive standards—a result that *Galliano* presumed Congress would seek to avoid. We thus rely on our general requirement of clear evidence and find no repeal.

* * *

On both statutory and First Amendment grounds, Hsia cross-appeals the district court's refusal to dismiss Count One: (conspiracy). On its face, of course, this refusal is plainly not a "final decision" over which 28 U.S.C. § 1291 gives us jurisdiction. Hsia nevertheless suggests two grounds for appellate jurisdiction: the collateral order doctrine and pendent appellate jurisdiction. We reject both.

To qualify as a final collateral order appealable under § 1291, the order at issue must, among other things, "be effectively unreviewable on appeal from a final judgment," *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 468 (1978)—that is, it must involve "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. MacDonald,* 435 U.S. 850, 860 (1978). Hsia's asserted rights—principally free speech and free expression—do not so qualify. Unlike congressional Speech or Debate immunity, *see Helstoski v. Meanor,* 442 U.S. 500 (1979), for example, they are not

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choose among them, *see United States v. Batchelder,* 442 U.S. 114,123-24 (1979).

rights to avoid trial altogether. *But see United States v. P.H.E., Inc.*, 965 F.2d 848, 855 (10th Cir. 1992) (finding that "unique confluence of factors" made First Amendment-based collateral appeal permissible). We apply the collateral order doctrine "with the utmost strictness in criminal cases," *Flanagan v. United States*, 465 U.S. 259, 265 (1984); any rule allowing immediate appeals for defendants advancing some First Amendment reason why an indictment should be dismissed would expose a vast array of criminal trials to interruption.

Hsia alternatively asserts pendent jurisdiction. But in dictum in *Abney v. United States*, 431 U.S. 651 (1977), the Supreme Court appeared to rule out such a theory:

> In determining that the courts of appeals may exercise jurisdiction over an appeal from a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds, we, of course, do not hold that other claims contained in the motion to dismiss are immediately appealable as well . . . . [S]uch claims are appealable if, and only if, they too fall within *Cohen's* collateral-order exception to the final-judgment rule. Any other rule would encourage criminal defendants to seek review of, or assert, frivolous double jeopardy claims in order to bring more serious, but otherwise nonappealable questions to the attention of the courts of appeals prior to conviction and sentence.

Id. at 662-63. Though the statement is only dictum, we think it right to take it literally, at least as to defendants' attempted appeals. *Cf. United States v. Zafiro*, 945 F.2d 881, 885 (7th Cir. 1991) (suggesting that pendent appellate jurisdiction

may allow government to challenge, at time of an interlocutory appeal authorized by § 3731, grant of severance to multiple defendants). An even partly open door could enable defendants to achieve untoward delay by coupling extra claims with a weak interlocutory appeal, and thus would give them an incentive to raise weak claims before the trial court on issues allowing interlocutory appeals; even where the interlocutory appeal is brought by the government, as here, we see no reason to give the defendant a windfall opportunity to delay proceedings via cross-appeal.

* * *

We reverse the district court's dismissal of Counts Two through Six, dismiss Hsia's cross-appeal for lack of jurisdiction, and remand the case for proceedings consistent with this opinion.

So ordered.

ROGERS, *Circuit Judge,* concurring:

I join the court in reversing dismissal of counts two through six, and remanding the case for trial. Our remand order means that any appellate disposition of count one could not resolve the entire case on appeal. Absent such an efficiency ground for review, or any other compelling reason to act now rather than after trial, there is no basis for exercising pendent appellate jurisdiction over Hsia's challenges to count one. The court therefore need not decide whether and under what conditions a court may exercise pendent jurisdiction over interlocutory appeals in criminal cases that may arise in the future. Consequently, the court's dictum purporting to bar such jurisdiction over claims raised by defendants is unnecessarily broad.

Hsia's pendent appellate jurisdiction claim would fail even under the standards applicable to civil cases. Addressing her challenges to count one now would not dispose of the case, *see Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d 1020, 1026-27 (D.C. Cir. 1997), and there is nothing in the record to suggest that her cross-appeal is one of those "rare exceptions" where "substantial considerations of fairness or efficiency" justify exercising pendent jurisdiction. *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 678-79 (D.C. Cir. 1996). Our remand of counts two through six demonstrates, moreover, that the issues on cross-appeal are not so "inextricably intertwined" with those of the jurisdictionally proper appeal that "review of the former . . . [is] necessary to ensure meaningful review of the latter." *Swint v. Chambers County Comm'n,* 514 U.S. 35, 51 (1995). In short, Hsia has not advanced a compelling reason to review count one before trial.

Hence, the court has no occasion to decide whether exercising pendent appellate jurisdiction over a criminal defendant's claim may in some circumstances be appropriate. Contrary to the court's suggestion, the Supreme Court has not foreclosed such jurisdiction. The court relies on dictum from *Abney v. United States,* 431 U.S. 651, 662-63 (1977), that it reads to hold by negative implication that pendent appellate jurisdiction is not available over claims by defendants in criminal cases. *See* opinion at 13. The Supreme Court's subsequent decision in *Swint* suggests a less rigid civil-criminal distinction than this court attempts to extract from *Abney.* First, the *Swint* Court did not characterize *Abney* as completely barring pendent appellate review in criminal cases, but rather as rejecting a rule "loosely allowing" such review. *See Swint,* 514 U.S. at 49-50. Second, in *Swint,* a civil case, the Court noted that *Abney's* reasoning applied in both civil and criminal

contexts, but went on to permit at least some pendent jurisdiction in civil appeals. *See id.* This extension of *Abney* to the civil context does not automatically mean that *Swint* likewise extends to the criminal context, but suggests that the *Abney* dictum may not be a sturdy foundation upon which to base a categorical limit to this court's appellate jurisdiction.

All of the reasons offered by the court to deny pendent jurisdiction in criminal appeals would also justify withholding such review over claims raised by defendants in civil appeals, *see* opinion at 13-14, and yet review is available in civil cases if certain strict standards are satisfied. *See, e.g., Swint,* 514 U.S. at 46-50; *Clinton v. Jones,* 520 U.S. 681, 707 n.41 (1997); *Gilda Marx,* 85 F.3d at 678. While these standards may apply more stringently in criminal cases, *cf. United States v. Rostenkowski,* 59 F.3d 1291, 1301 (D.C. Cir. 1995), it is not clear that criminal appeals are so fundamentally different from civil appeals that a safety-valve to the finality requirement applies in one but never in the other, nor that the asymmetric scheme posited by the court, categorically foreclosing review only of defendants' claims, even when the government has also filed an interlocutory appeal, *see* opinion at 14, necessarily follows.

Accordingly, I would dismiss Hsia's cross-appeal on the relatively narrow grounds discussed above, and leave broader questions for a case that actually raises them.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Dated and Filed September 10, 1998)

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 98-0057 (PLF)
MARIA HSIA,	)	
Defendant.	)	

OPINION

This case is before the Court on defendant's Motion No. 1 (to Dismiss the Indictment for Violation of Due Process), Motion No. 2 (to Dismiss Counts in the Indictment for Their Positive Repugnance to the Federal Election Campaign Act), Motion No. 3 (to Dismiss Count 1 of the Indictment for Failure to State an Offense), Motion No. 5 (to Dismiss Counts 2 through 6 for Failure to State an Offense (Causation)), Motion No. 6 (to Dismiss Counts 2 through 6 for Failure to State an Offense (False Statements)), Motion No. 7 (to Dismiss Count 4 and 5 for Failure to State an Offense (Soft Money)), Motion No. 9 (to Dismiss Indictment Because it Offends the First Amendment) and Motion No. 10 (to Dismiss Indictment Because It Selectively Prosecutes Maria Hsia). For the reasons discussed below, the Court

dismisses Counts 2-6, the false statements counts, and denies all other motions.[1]

I. BACKGROUND

Maria Hsia has been indicted on one count of conspiracy to defraud the United States by impairing and impeding the Federal Election Commission ("FEC") and the Immigration and Naturalization Service ("INS"), in violation of 18 U.S.C. § 371, and five counts of causing others to file false statements with the FEC, in violation of 18 U.S.C. §§ 1001 and 2(b). All six counts are predicated on political campaign solicitations by Ms. Hsia that allegedly involved the use of "conduit" contributors to hide the "true" or "actual" sources of the funds in violation of various provisions of the Federal Election Campaign Act ("FECA"), 2 U.S. C. §§ 431, et seq.

FECA provides a detailed and comprehensive scheme to regulate the financing of federal elections by, among other things, limiting contributions to electoral campaigns and requiring candidates to report receipts and expenditures. Of specific relevance to this case, FECA provides that "[n]o person shall make contributions" that exceed certain limits set forth in the statute, 2 U.S.C. § 441a; that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution," 2 U.S.C. § 441f; and that it is unlawful for "any corporation whatever . . . to make a contribution or

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[1] With one exception, the Court already has dealt with the other pretrial motions that were argued on July 27 and 28, 1998. See Opinion of August 13, 1998. The remaining motion, Motion No. 4 (to Dismiss Indictment Because It Is Tainted) is dealt with in a separate Memorandum Opinion and Order issued today.

expenditure in connection with any election at which presidential or vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices." 2 U.S.C. § 441b(a).

A "contribution" is defined by the statute, in relevant part, as "money or anything of value made by any person for the purpose of influencing any election for *Federal* office." See 2 U.S.C. § 431(8)(A) (emphasis added).[2] Because most of FECA's restrictions apply only to funds contributed "for the purpose of influencing any election for Federal office," many political committees have set up separate accounts for money that has been donated: money that has been contributed subject to the proscriptions of FECA ("hard money") is deposited into a "federal" account and is used to finance federal election campaigns, while all other money that is donated ("soft money") is deposited into a "non-federal" account and is used for, among other things, state and local campaigns or issue advertising.

FECA requires "political committees," including national political parties, to exert "best efforts" to identify each person who made "contribution[s]" in the aggregate annual amount of $200 or more and to report that information to the FEC. 2 U.S.C. §§ 432(i), 434. FEC regulations require national political party committees to report *any* receipt of funds over $200, regardless of whether the funds are deemed "hard" or "soft" money. 11 C.F.R. § 104.8(a), (e). The statute charges the Federal Election

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[2] "Contribution" is separately and more broadly defined for purposes of 2 U.S.C. § 441b. 2 U.S.C. § 441b(b)(2). The separate definition, however, is irrelevant to this case.

Commission with the administration of FECA and grants the FEC exclusive jurisdiction over civil enforcement. 2 U.S.C. § 437c. It provides for both civil and criminal enforcement, and specifies criminal penalties for certain violations, up to a maximum of one year imprisonment and/or a fine. 2 U.S.C. § 437g(d). The Department of Justice prosecutes criminal violations of the statute. 2 U.S.C. § 437g(a)(5)(C).

Count 1 of the indictment charges that Ms. Hsia, a Buddhist, conspired with the International Buddhist Progress Society ("IBPS"), a tax-exempt religious organization doing business as the Hsi Lai Temple (the "Temple"), and other unnamed co-conspirators to defraud the United States by impairing, obstructing, impeding and defeating the lawful functions and duties of the FEC and the INS in violation of 18 U.S.C. § 371.[3] The indictment alleges that Ms. Hsia solicited IBPS to make contributions and donations through "conduits" (some of whom were monks, nuns and volunteers from IBPS) and that Ms. Hsia in some instances acted as a conduit for donations or contributions. The indictment alleges that Ms. Hsia (1) impaired and impeded the FEC by concealing the fact that IBPS was the true source of the contributions, and (2) impaired and impeded the INS by submitting documents to the INS stating that IBPS was not participating in political campaigns so that the INS would permit foreign nuns and monks associated with IBPS to enter or remain in the United States when she knew that IBPS in fact was making political contributions.

Counts 2-6 charge Ms. Hsia with causing the making of false statements to the FEC in violation of 18 U.S.C. §§ 2 and 1001. These counts appear to be based on conduct similar to (if not the same as) that alleged in Count 1. The indictment alleges that Ms. Hsia knowingly and willfully

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[3] IBPS has not been indicted for its alleged role in the conspiracy.

caused various political committees to submit material false statements to the FEC by concealing the identity of the true source of contributions from the committees which relayed the false information to the FEC. Each count addresses a different report submitted to the FEC by a political committee which allegedly contained false statements about the identity of actual contributors. Count 2 pertains to a July 18, 1995 report and Count 3 to an October 17, 1995 report by the Clinton-Gore '96 Committee; Count 4 relates to an April 15, 1996 report and Count 5 to a July 15, 1996 report by the Democratic National Committee; and Count 6 pertains to an October 24, 1996 report by the Patrick Kennedy Committee. Counts 2 and 3 do not identify the actual source of the contributions, but Counts 4-6 allege that IBPS was the actual contributor. Counts 2-6 all allege that Ms. Hsia solicited the contributions at issue, but only Count 6 alleges that Ms. Hsia herself wrote a contribution check for which she was reimbursed by IBPS.

II. MOTIONS TO DISMISS INDICTMENT ON FIRST AMENDMENT GROUNDS

A. Defendant's Motion To Dismiss Indictment For Its Positive Repugnance to the Federal Election Campaign Act

Ms. Hsia argues that the Federal Election Campaign Act, 2 U.S.C. § 431, et seq., impliedly repeals the more general provisions of the Federal Criminal Code, specifically the false statements statute, 18 U.S.C. § 1001, and the conspiracy statute, 18 U.S.C. § 371. This Court already has ruled that under accepted principles of statutory construction, repeals by implication are not favored and there must be substantial evidence that Congress expressly intended to preempt a general statute with a more specific statutory scheme in order to deprive a prosecutor of discretion to determine on which of a variety of seemingly applicable

statutes to base a prosecution. Under this traditional analysis, FECA does not impliedly repeal or preempt the more general criminal statutes on which the prosecutor and grand jury have proceeded. See United States v. Trie, Criminal No. 98-0029, 1998 WL 427550, at *9 (D.D.C. July 17, 1998). Ms. Hsia maintains, however, that because the conduct regulated by FECA is political speech subject to First Amendment protection and because Congress carefully crafted and later amended FECA in order to avoid infringing on First Amendment rights, FECA necessarily occupies the field and impliedly repealed more general criminal statutes that are not tailored to protect First Amendment rights of political speech and association.

18 U.S.C. § 371 and 18 U.S.C. § 1001 broadly proscribe criminal conduct and have been applied in a wide range of circumstances. FECA, on the other hand, specifically proscribes certain conduct in the context of federal elections and provides both civil and criminal penalties for certain violations of the Act. 2 U.S.C. § 437g(d). The government does not argue that FECA's criminal provisions are unavailable to it in prosecuting Ms. Hsia. Rather, it argues that the more general criminal provisions also are available regardless of whether FECA provides a criminal penalty for the charged conduct and that the government has the discretion to decide under which statutes to proceed, the misdemeanor provisions of FECA or the felony provisions of 18 U.S.C. § 371 and 18 U.S.C. § 1001. It relies on the established principle that "whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." United States v. Batchelder, 442 U.S. 114, 124 (1979). See also Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); United States v. Moore, 423 U.S. 122, 138 (1975).

Ordinarily, general criminal provisions remain available to supplement a specific statutory scheme unless there is evidence either (1) that Congress expressly intended to preempt a general statute with the more specific statutory scheme, or (2) that there is what the Supreme Court has labeled "a positive repugnancy" between the provisions of the specific statutory scheme and the more general statutes such that Congress must have intended to repeal the more general provisions by implication. See United States v. Borden Co., 308 U.S. 188, 198-99 (1939). The parties here agree that when Congress enacted FECA it did not expressly repeal the more general criminal provisions and that repeal by implication is not favored. See United States v. Borden, 308 U.S. at 198; United States v. Curran, 20 F.3d 560, 566 (3d Cir. 1994); United States v. Hopkins, 916 F.2d 207, 218 (5th Cir. 1990); United States v. Oakar, 924 F. Supp. 232, 244-45 (D.D.C. 1996), *aff'd in part, rev'd on other grounds*, 111 F.3d 146 (D.C. Cir. 1997). The question is whether the pervasive First Amendment implications of federal election regulation necessarily alter the framework of analysis.

The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 ("1971 FECA"), sought to regulate campaign financing in a more comprehensive way than its predecessor campaign financing statute. See e.g., H.R. Rep. No. 92-564 at 3 (1971). The major provisions of the 1971 Act focused primarily on limiting the activities of candidates for federal office, rather than on placing limitations on contributors. The Act imposed spending limits on the amount of personal funds a candidate could use in a federal election, 1971 FECA § 203, amending 18 U.S.C. § 608, and on the amount a candidate could spend for the use of communications media. 1971 FECA § 104. The Act also set forth a variety of disclosure requirements and, as part of those requirements, it prohibited contributions in the name of another, so-called conduit contributions. 1971 FECA § 310,

2 U.S.C. § 440 (1970 ed. Supp. II 1972). A number of specific criminal provisions for violations of the Act were enacted and made a part of Title 18 of the United States Code, the general Federal Criminal Code, but Congress also provided that "[a]ny person who violates any of the provisions" of Title III, Disclosure of Federal Campaign Funds, which included the prohibition against contributions in the name of another, "shall be fined not more than $1,000 or imprisoned not more than one year, or both." 1971 FECA § 311 (a), 2 U.S.C. § 441 (1970 ed. Supp. II 1972).[4]

In 1974, Congress amended the Federal Election Campaign Act to impose individual contribution limits and overall candidate expenditure limits and to establish a Federal Election Commission. Pub. L. No. 93-443, 88 Stat. 1263 (" 1974 FECA Am "). The Senate version of the bill made the FEC the "primary civil *and criminal enforcement agency* for violation of the provisions of the Act" and provided that the Attorney General could only prosecute violations of the Act "after the [FEC] is consulted and consents to such prosecution." S. Rep. No. 93-1237 at 93 (1974) (emphasis added). The Conference Committee deleted that provision and made clear that while "the [FEC] is given power to bring civil actions in Federal District courts to enforce the provisions of the Act . . . [t]he primary

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[4] The bill reported out of the Committee on House Administration imposed higher penalties for "willful" violations of the disclosure provisions and also provided that any "violation of this legislation by a person who, at the time of the violation, was a candidate for Federal elective office (other than President or Vice President) will disqualify such person from becoming a candidate for Senator, Representative, Delegate, or Resident Commissioner for a period of five years." H.R. Rep. No. 92-564, at 12-13 (1971). Those penalties did not survive.

jurisdiction of the [FEC] to enforce the provisions of the Act is not intended to interfere in any way with the activities of the Attorney General or Department of Justice personnel in performing their duties under the laws of the United States." H.R. Rep. No. 93-1438 at 94 (1974).

The 1974 Amendments maintained the prohibition of contributions in the name of another, but moved the prohibition to Title 18 of the United States Code. A separate criminal enforcement provision for violations of that section was passed which retained the maximum one year imprisonment penalty but increased the maximum fine to $25,000. 1974 FECA Am. § 101(f)(1), adding 18 U.S.C. § 614; 1974 FECA Am. § 101(f)(4). Both in 1971 when it passed FECA and in 1974 when it amended it, Congress was aware that regulation of elections had First Amendment implications, and the issue of First Amendment rights was discussed during the crafting of FECA's provisions. See e.g., S. Rep. No. 92-229 at 122-23 (supp. views of Messrs. Prouty, Cooper and Scott) (explaining that 1971 Act did not contain limitation on individual contributions because "such a limitation probably is unconstitutional"); H. Rep. No. 92-564 at 33 (add'l. views of Mr. Frenzel) (commenting on provision of 1971 House bill that would have limited individual contributions: "the limitations of contributions by individuals may . . . be unconstitutional . . . . The suppression of free speech and the reduced participation in political processes is not justified").

In 1976, the Supreme Court held that a number of the provisions of FECA unconstitutionally restricted the First Amendment rights to political expression and association. Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*). The Court first noted that the "Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and

debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." Id. at 14. The Court concluded, however, that "although the Act's contribution and expenditure limits both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limits on financial contributions." Id. at 23. "The expenditure limitations contained in the Act represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech, [while limitations on contributions] entail[s] only a marginal restriction upon the contributor's ability to engage in free communication." Id. at 19-21. The Court therefore upheld the constitutionality of the contribution limitations but struck down the expenditure limits because they "place substantial and direct restrictions on the ability of candidates, citizens and associations to engage in protected political expression . . . ." Id. at 58-59.[5]

The Court next turned to the disclosure requirements of FECA. It found that compelled disclosure "can seriously infringe on privacy of association and belief guaranteed by

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[5] One can certainly debate the wisdom of the distinctions made by the Court -- whether expenditure limitations are more intrusive of First Amendment interests than contribution limitations, whether both should have been treated the same for First Amendment purposes, and, if they were so treated, whether First Amendment principles and the furtherance of free and robust political debate would be better served by no restrictions or greater restrictions. Justice Thomas' partial dissent in Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 631- 49 (1996) (Thomas, J., dissenting in part), provides a particularly instructive discussion of the view that there is no principled reason to distinguish between contributions and expenditures for First Amendment analysis.

the First Amendment" and "cannot be justified by a mere showing of some legitimate governmental interest." Buckley v. Valeo, 424 U.S. at 64. The constitutionality of the disclosure provisions requiring major *political committees* to report contributions was not challenged, but petitioners did challenge the constitutionality of the reporting requirements that FECA imposed on *individuals* and *minor* political parties. Id. at 68. FECA required any individual who made "contributions or expenditures" aggregating over $100 to entities other than political committees or candidates to file a statement with the FEC. 2 U.S.C. § 434(e) (1970 ed. Supp. V). The Court found that in order to avoid problems of constitutional vagueness, the definition of "expenditure" had to be narrowed to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." Id. at 80. As construed and narrowed, the disclosure provision "bears a sufficient relationship to a substantial governmental interest" and therefore passes constitutional muster. Id. The Court noted that it was especially necessary to clearly define the scope of the reporting requirement because "the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights." Id. at 76-77.[6]

The Chief Justice expressed concern that because FECA was intended to operate as a holistic response to campaign financing abuses, the decision in Buckley to strike

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[6] In the remainder of its opinion in Buckley, the Court held (1) that the powers given to the Federal Election Commission could be exercised only by officers of the United States appointed in conformity with Article II, § 2 of the Constitution and that the Commission as constituted therefore was unconstitutional, and (2) that the public financing scheme for presidential elections was constitutional. Buckley v. Valeo, 424 U.S. at 85-143.

down discrete portions of FECA would undermine the Act as a whole. See, e.g., Buckley v. Valeo, 424 U.S. at 235 (Burger, C.J., concurring in part and dissenting in part) ("the Court's result does violence to the intent of Congress in this comprehensive scheme of campaign finance . . . the Court fails to recognize that the whole of this Act is greater than the sum of its parts"). The Chief Justice, demonstrating a certain degree of prescience, also predicted that "the Court's holding will invite avoidance, if not evasion, of the intent of the Act, with 'independent' committees undertaking 'unauthorized' activities in order to escape the limits on contributions." Id. at 253 (Burger, C. J., concurring in part and dissenting in part). For similar reasons, Justice White would have upheld both the contribution and expenditure limits as constitutional: "There is nothing objectionable . . . in the attempt to insulate the political expression of federal candidates from the influence inevitably exerted by the endless job of raising increasingly large sums of money. I regret that the Court has returned them all to the treadmill . . . . The holding is perhaps not that federal candidates have the constitutional right to purchase their election, but many will so interpret the Court's conclusion in this case." Id. at 265-66 (White, J., concurring in part and dissenting in part).[7]

Rather than attempting to enact a new comprehensive law in reaction to Buckley, Congress again amended the

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[7] In addition to the Chief Justice and Justice White, Justice Marshall, Justice Blackmun and now Chief Justice Rehnquist all dissented from portions of the Court's opinion. Justice Stevens, newly-appointed to the Court, did not participate. So much of our federal regulatory regimen with respect to federal elections and our practical politics having been driven by the opinion in Buckley for over two decades, perhaps it is now time—or past time—for both Congress and the Supreme Court to seriously reexamine it. See, e.g., Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. at 631-49 (Thomas, J., dissenting in part).

statute. While the 1976 Amendments primarily focused on reconstituting the Federal Election Commission and correcting the constitutional violations, the Amendments also moved the criminal enforcement provisions of the Act from Title 18 and consolidated them into one provision in Title 2. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (May 11, 1976) ("1976 FECA Am.") §§ 112, 201. Under the new consolidated enforcement provision, any person who "knowingly and willfully commits a violation of any provision or provisions of this Act which involves the making, receiving, or reporting of any contribution or expenditure having a value in the aggregate of $1000 or more during a calendar year shall be fined in an amount which does not exceed the greater of $25,000 or 300 percent of the amount of any contribution or expenditure involved in such violation, imprisoned for not more than 1 year, or both." 1976 FECA Am. § 201.[8] In addition, the 1976 amendments provided that where the FEC finds probable cause to believe there is such a knowing and willful violation, it may refer such apparent violation to the Attorney General, 2 U.S.C. § 437g(a)(5)(D), although such a referral is not a prerequisite to a criminal prosecution. See infra at 16.[9]

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[8] That provision, now codified at 2 U.S.C. § 437g(d)(1)(A), has remained essentially the same since 1976, except that the threshold level of aggregated contributions or expenditures necessary to trigger these criminal penalties has been increased to $2000 or more during a calendar year.

[9] Before the 1976 amendments, 18 U.S.C. §§ 608, 610, 611, 613, 614, 615, 616 and 617 had prohibited certain kinds of conduct in connection with federal elections, including exceeding contribution and expenditure limitations and contributing in the name of another, and each section provided a different penalty scheme for violations. Section 610 (prohibiting contributions or expenditures by national banks, corporations and labor organizations), Section 611

Against this backdrop of legislative and judicial decisions, Ms. Hsia argues that because FECA operates in areas protected by the First Amendment and because Congress so carefully crafted a comprehensive enforcement scheme to assure that it does not violate the Constitution, FECA necessarily *pro tanto* displaces the more general conspiracy and false statements statutes. For her argument, she relies primarily, if not exclusively, on the D.C. Circuit's opinion in Galliano v. United States Postal Service, 836 F.2d 1362 (D.C. Cir. 1988). Ms. Hsia maintains that Galliano establishes a different framework for analysis of implied repeal in the FECA context, where a complex regulatory statute sets forth an enforcement scheme in an area permeated by First Amendment concerns.[10]

In Galliano, Americans for Phil Gramm ("APG"), a political action committee that was not the authorized committee of then-Congressman Gramm, solicited money in a series of mailings. APG's first mailing failed to include a disclaimer required by FECA stating that the solicitation was not authorized by Representative Gramm or his senatorial campaign committee. Subsequent mailings, however, did contain an appropriate disclaimer. The FEC found "probable cause" to believe that the first mailing violated FECA and

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(prohibiting contributions by government contractors) and Section 613 (prohibiting contributions by foreign nationals) all provided for felony penalties. When the penalty provisions were consolidated and moved to Title 2, the maximum penalty for *any* violation became one year in prison and/or a fine, a misdemeanor penalty.

[10] While a number of courts, including this one, have found that FECA does not replace criminal remedies, none has specifically addressed these First Amendment concerns. See United States v. Curran, 20 F.3d at 566; United States v. Hopkins, 916 F.2d at 218; United States v. Trie, Criminal No. 98-0029, 1998 WL 427550, at *9; United States v. Oakar, 924 F. Supp. at 244-45.

entered into a conciliation agreement with APG, but it did not pursue any action with respect to the later mailings. Meanwhile, the United States Postal Service took administrative enforcement action against the APG for all of its mailings, invoking a Postal Service statute prohibiting the use of any scheme or device "for obtaining money . . . through the mail by means of false representations." 39 U.S.C. § 3005 (1982). A Judicial Officer of the Postal Service issued two remedial orders, one of which essentially directed the postmaster to stop each piece of mail addressed to APG, inspect it and return it to the sender if it was a response to APG's solicitations. APG filed suit in federal court to require the Postal Service to set aside its order.

On appeal, the court of appeals held that "the Postal Service, in its enforcement of [its false statements statute], may not impose constraints upon the names or disclaimers of organizations mailing solicitations for political contributions beyond those imposed by FECA." Galliano v. United States Postal Service, 836 F.2d at 1367. In an opinion by now Justice Ginsburg, the court acknowledged the arguments of the Postal Service that Congress did not expressly repeal the Postal Service statute when it passed FECA and that "repeals by implication are not favored." Id. at 1369. Nonetheless, it concluded that to "permit the Postal Service to base findings of false representation on a political action committee's name and disclaimers that are consistent with FECA requirements would defeat the substantive objective of that Act's first-amendment-sensitive provisions." Id. at 1370. The court therefore held that if "FECA requirements are met, then as we comprehend that legislation, no further constraints . . . may be imposed by other governmental authorities." Id. The Court aiso held that if the mailings contained false representations of a sort not covered by FECA, for instance if APG made false representations concerning its past fundraising successes, the Postal Service could apply its false

statements statute to that conduct even if the mailings were done for a political purpose. Id. at 1371.

"The tension between the general false representation provisions of [the Postal Service false statements statute] and the specific disclosure requirements of [FECA]" at issue in Galliano has clear parallels to the tension between FECA and the criminal false statements and conspiracy statutes at issue here. See Galliano v. United States Postal Service, 836 F.2d at 1367. The essence of the charges against Ms. Hsia center on alleged conduit contributions which led to false statements by political committees in their disclosure reports to the FEC, and FECA contains a comprehensive enforcement scheme for the civil and misdemeanor prosecution of conduit contributions. See 2 U.S.C. § 437g(d). Moreover, the legislative history cited by the court in Galliano for the proposition that the name and disclaimer provisions at issue in that case specifically safeguard the "full enjoyment of the First Amendment rights of individuals and groups to make expenditures for political expression" arguably applies also to the disclosure provision at issue in this case. See H.R. Rep. No. 94-917 at 5 (1976), cited in Galliano v. United States Postal Service, 836 F.2d at 1370. The Court concludes, however, that Galliano does not control this case.

First, in Galliano, the court of appeals found that the FEC's authority displaced the authority of the Postal Service; in other words, the authority of one administrative agency under a specific statutory scheme preempted the authority of another administrative agency under a different statutory scheme. The court relied heavily on the fact that both FECA and its legislative history state that only the FEC, "and no other governmental authority," has jurisdiction to enforce the *civil* provisions of FECA. Galliano v. United States Postal Service, 836 F.2d at 1368. It therefore held that "the FEC is

the exclusive *administrative* arbiter of questions concerning the name identifications and disclaimers of organizations soliciting political contributions." Id. at 1370 (emphasis added).

In this case, by contrast, Ms. Hsia proposes displacing the authority of the Attorney General, the chief law enforcement officer of the United States, to bring *criminal* charges under the general provisions of the Federal Criminal Code. The Attorney General, however, is in a fundamentally different position from administrative agencies such as the Postal Service. She is charged with prosecuting criminal violations of the federal election laws as well as other criminal laws, and her authority is in no way limited by the FEC. See Galliano v. United States Postal Service, 836 F.2d at 1368 n. 6 (Attorney General has authority to criminally prosecute FECA violations regardless of whether FEC refers investigation to her); United States v. International Union of Operating Engineers, Local 701, 638 F.2d 1161 (9th Cir. 1979) (same). Unlike the situation presented in Galliano, there is no issue of another agency infringing on the FEC's authority; in this case, the authority to criminally prosecute rests exclusively with the Attorney General.

Second, the court in Galliano found it significant that the FEC is required to conciliate civil violations of FECA prior to instituting any formal civil enforcement action. See 2 U.S.C. § 437g(a)(4). If conciliation is not successful, the FEC cannot administratively impose civil penalties; instead it must institute a civil action in federal district court. See 437g(a)(6)(A). If the Postal Service had the authority to administratively impose sanctions for conduct that is covered by FECA, the "first-amendment-prompted arrangements Congress devised for FECA enforcement actions" would be sacrificed. Galliano v. United States Postal Service, 836 F.2d at 1370.

The "first-amendment prompted" conciliation provisions, however, apply only to civil enforcement actions and do not apply to criminal actions. See 2 U.S.C. § (a)(5)(C). Because the Attorney General may directly prosecute violations of FECA regardless of whether the FEC has attempted to conciliate the violation, see United States v. International Union of Operating Engineers, Local 701, 638 F.2d at 1163, no procedural protection is sacrificed by allowing her to charge violations under the general provisions of the Federal Criminal Code as well as under FECA. Moreover, unlike the Postal Service in Galliano, the Attorney General cannot impose penalties for violations of criminal statutes without instituting a proceeding in court. Regardless of whether she chooses to criminally prosecute someone under FECA or under a more general provision of the Federal Criminal Code, she must institute an action in a court of law. Allowing the Attorney General to proceed under general provisions of the Federal Criminal Code rather than exclusively under FECA therefore sacrifices none of the "first-amendment prompted" procedural protection of FECA.[11]

Third, the court in Galliano focused on the fact that the finding of the Postal Service that the statements were misleading was inconsistent with the FEC's determination that the solicitations met the disclaimer requirements of FECA. The criminal provisions at issue in this case, however, rely for their meaning on the proscriptions and the definitions of FECA itself, and the definition of "contribution" and other relevant terms will control the scope of the jury's considerations and be included as part of the

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[11] There are, however, other constitutional constraints on her choice of statutes which are discussed infra at 39-60.

jury instructions.[12] The criminal statutes invoked merely provide additional enforcement mechanisms; they do not seek to penalize conduct that is expressly permitted by FECA. If this were a case in which Ms. Hsia was being prosecuted for conduct that was permissible under FECA, Galliano would be more on point. In this case, however, the conduct allegedly at issue—the use of conduits to conceal corporate contributions from the FEC—is specifically proscribed by FECA; there is no inconsistency between FECA and the general criminal provisions employed by the government here.

Nor is there *any* indication in the language or legislative history of FECA to indicate that Congress intended the criminal provisions of the Act to displace any of the more general federal criminal provisions in Title 18 of the United States Code. In the 1976 Amendments, Congress created one criminal penalty provision in Title 2 for violations of FECA and relocated the various criminal penalties for FECA violations that had been in Title 18. 1976 FECA Am. § 201, 2 U.S.C. § 437(g). The legislative history concerning the new FECA criminal provision, however, focused on the need to simplify the enforcement scheme and makes no mention of repealing the more generally applicable provisions of Title 18. H.R. Rep. No.

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[12] The government's theory in this case clearly revolves around conduct related to "contributions," and the Court already has indicated that "the easiest way to deal with [the definition of contribution is] just to tell the jury what Congress says it means and say [that] as a matter of law contribution means what is set forth in [2 U.S.C. § 431(8)(a)]." Transcript of July 27-28, 1998 Oral Argument ("Transcript") at 124. The government has agreed that it must "show in the circumstances of the case that [the alleged contributions at issue] fall[] within the definition of hard money as is set forth [in FECA]. That these checks were intended ultimately to be for the purpose of going towards a federal election." Transcript at 151.

94-917 at 3 (1976) ("[o]n the occasion of reconstituting the Federal Election Commission the Committee concluded that it was appropriate to simplify and rationalize the present enforcement system"). The only legislative history cited by Ms. Hsia indicating that Congress may have reduced criminal enforcement power when it consolidated the criminal provisions is in the statements of those who were opposed to the legislation, not those who supported it. See Def's Motion No. 3 at 7. The characterizations of opponents to legislation, however, are entitled to little weight. See United States v. International Union of Operating Engineers, Local 701, 638 F.2d at 1168.

While the defendant's preemption argument is intriguing, it ultimately fails. Wisely or not, Chief Justice Burger's holistic approach to the statute was rejected in Buckley, and there is no language or legislative history anywhere in the "comprehensive scheme" that is FECA to indicate that Congress intended to repeal any of the general criminal provisions of Title 18 when it enacted or amended the statute. Finally, while there are facial similarities between the situations presented by Galliano and this case, the significant differences that appear upon careful analysis ultimately carry the day. The Court therefore concludes that FECA does not displace *pro tanto* the general criminal provisions of 18 U.S.C. § 371 and 18 U.S.C. §§ 1001 and 2(b).

B. Defendant's Motion to Dismiss Indictment Because It Offends the First Amendment (Religion)

Ms. Hsia next asserts that the indictment infringes on the right to free exercise of religion in violation of the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb. The indictment is premised on the government's allegation that Ms. Hsia orchestrated a scheme

in which monks and nuns from the Hsi Lai Temple wrote checks to political committees for which they were reimbursed. According to the government, the contributions therefore were made with money that "actually" belonged to the Temple and the monks and nuns were acting as conduits for the Temple, the "true contributor."

Ms. Hsia maintains that the government's theory misperceives religious doctrine and the role and use of wealth within the Buddhist community at the Temple. According to her, the Temple does not possess "property" separate from the monks' and nuns' property; all of the property that "belongs" to the Temple "belongs" to each of the monks and nuns. Under the Temple's religious doctrine, funds are held communally but are used for individual personal expenses; a monastic who incurs personal expenses may receive a payment for the expense from a Temple account, but this personal expense is not thereby converted into a Temple or "corporate" expenditure. Ms. Hsia argues that because the entire premise of the indictment is that monks and nuns acted as "conduits" for the Temple, the indictment necessarily relies on a notion of property that fundamentally is opposed to the religious doctrines of Humanistic Buddhism espoused by members of the Temple. She therefore contends that the indictment must be dismissed because it violates the First Amendment right to free exercise of religion. Alternatively, she has requested an evidentiary hearing on the issue of Buddhist beliefs and particularly the beliefs and practices of members of the Hsi Lai Temple.

The government first contends that Ms. Hsia has no standing to assert a free exercise defense because any such First Amendment right that might be implicated in this case belongs to the Temple and its monastics rather than to Ms. Hsia. Ms. Hsia argues that she meets the requirements for third party standing, and the Court agrees.

A criminal defendant has standing to raise the constitutional rights of a third party provided that (1) the defendant has suffered an "injury-in-fact" giving her a concrete interest in the outcome of the issue; (2) the defendant has a close relationship to the third party; and (3) there is some hindrance to the third party's ability to protect its own interests. See Campbell v. Louisiana, 118 S. Ct. 1419, 1422-23 (1998); Powers v. Ohio, 499 U.S. 400, 410-11 (1991). First, Ms. Hsia has suffered a cognizable injury from the alleged violation of constitutional rights in this case. If the government's theory of property truly infringes on the religious rights of the Temple and its monastics, Ms. Hsia's guilt or innocence may well turn on whether she can assert the free exercise right. Unlike a case in which a criminal defendant is trying to assert the rights of a third party to suppress illegally obtained evidence, it is not clear that the indictment in this case can stand without the government's notion of property that allegedly violates the right to free exercise. Second, Ms. Hsia has a close relationship to the Temple and its monastics. Not only is she a member of the Buddhist community, the Temple is an unindicted co-conspirator. She and the Temple therefore have "a common interest" in the religious practices of the Temple and in asserting First Amendment free exercise interests in response to the indictment, and she has "an incentive to serve as an effective advocate" on these issues. Campbell v. Louisiana, 118 S. Ct. at 1423. Finally, although the Temple is an unindicted coconspirator, there is no affirmative process by which the Temple can challenge the government's theory of property unless and until it is indicted.

On the merits of Ms. Hsia's First Amendment argument, the government asserts that the Supreme Court's decision in Employment Division v. Smith, 494 U.S. 872 (1990), alters the analysis of Ms. Hsia's claim because the Supreme Court in Smith held that in most circumstances, the

right of free exercise is not a defense against the application of an otherwise valid and neutral law of general applicability. Id. at 879, 884-85. The Court also recognized, however, that the First Amendment may bar application of such a law to a religiously motivated action in cases where the free exercise claim arises "in conjunction with other constitutional protections, such as freedom of speech and of the press." Id. at 881. See also E.E.O.C. v. Catholic University of America, 83 F.3d 455, 467 (D.C. Cir. 1996).

In this case, Ms. Hsia's free exercise claim arises in conjunction with the First Amendment protection of political expression and association, see supra at 9-12, and is thus one of those "hybrid situation[s]" involving both free exercise and free speech that the Court catalogued in Smith. Employment Division v. Smith, 494 U.S. at 881-82. The Court therefore concludes that Smith does not prevent Ms. Hsia from asserting her free exercise claim as a defense to the application of the generally applicable laws she is charged with violating. See Cantwell v. Connecticut, 310 U.S. 296, 304-07 (1940).[13] The question is whether that defense may or must be resolved on a motion to dismiss or whether it is more properly a factual matter for resolution by the jury at trial.

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[13] Ms. Hsia also argues that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, bars the government from pursuing this indictment. RFRA was an attempt by Congress to restore the protections of the First Amendment with respect to religion that had been recognized prior to the Supreme Court's decision in Smith. Because the Court has found that Smith does not limit Ms. Hsia's right to raise a defense based on her religious beliefs, RFRA does not afford any additional protection, and Ms. Hsia's RFRA claim fails for the same reason that her First Amendment free exercise claim fails.

While the government does not dispute that the Temple has the right to maintain a "community treasury" from which its monks and nuns withdraw funds, it argues that Ms. Hsia's First Amendment argument raises factual issues that must await resolution by the jury at trial. Relying on United States v. Ballard, 322 U.S. 78 (1944), Ms. Hsia counters that the indictment must be dismissed before trial because the jury cannot consider the truth or falsity of a religious belief.

The import of Ballard is clear: In the United States of America, there is no state religion, "the law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." United States v. Ballard, 322 U.S. at 86 (quoting Watson v. Jones, 13 Wall 679, 728 (1871)). No particular religion may be established by law, nor may the exercise of any be prohibited. U.S. CONST., amend. I. And "[i]f one could be sent to jail because a jury in a hostile environment found [particular religious] teachings false, little indeed would be left of religious freedom." United States v. Ballard, 322 U.S. at 87. Accordingly, when jurors in a criminal trial are asked to decide whether they accept or reject a particular religious doctrine -- what Justice Douglas called deciding upon the "truth or falsity" of a religious belief --"they enter a forbidden domain." Id. See In re Grand Jury Matter, Gronowicz, 764 F.2d 983, 987-88 (3d Cir. 1985), *cert. denied,* 474 U.S. 1055 (1986).

By contrast, juries routinely are asked to determine whether a person sincerely holds a religious belief and whether she acted out of or was motivated by that belief or for some other reason. See United States v. Rasheed, 663 F.2d 843, 847-48 (9th Cir.), *cert. denied,* 454 U.S. 1157 (1982). "The First Amendment does not protect fraudulent activity performed in the name of religion," and a properly instructed jury may consider the intent or motivation of a

person who invokes religious beliefs as a justification for her actions. Id. Indeed, while the Supreme Court in Ballard found that the validity of the defendants' religious beliefs was of no concern of the jury, it upheld a jury instruction that the jury could convict if it found that the defendants did not in good faith believe their representations about spiritual healing but made those representations for the purpose of obtaining money. United States v. Ballard, 322 U.S. at 84. See United States v. Seeger, 380 U.S. 163, 184 ("while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case").

In this case, Ms. Hsia has presented evidence that Buddhists from the Temple believe that personally possessing property gives rise to greed, which obstructs a person's spiritual development. Def 's Motion No. 9, Exh. 5 at 32. The Temple's monks and nuns therefore are encouraged to avoid managing personal accounts and instead to deposit all personal wealth into a community treasury and to withdraw funds only as needed for personal expenses. It would be inappropriate for the jury to consider whether that belief is true or false, acceptable or unacceptable. For instance, the jury may not consider whether it in fact is true that personal wealth obstructs spiritual development or whether it is reasonable to hold such beliefs. The jury may and in fact must consider, however, Ms. Hsia's motivation and the extent to which her conduct was motivated by the asserted religious beliefs. See United States v. Rasheed, 663 F.2d at 848.

The government represents that it expects to prove at trial that "the reimbursement money actually belonged to the Temple and that the Temple and the defendant understood that the Temple was the true (and illegal) source of the

funds," Gov't Memorandum in Opposition to Def's Pretrial Motions 1-11, 13 & 14 at 46, and that the Temple reimbursed individuals for reasons other than religious doctrine. Gov't Response to Def's Supplement to Motion to Dismiss at 4. It argues that the defendant's claim that all Temple monies are communal is a factual question and a matter of defense for the jury to consider at trial. Transcript at 45.[14] If the jury finds that Ms. Hsia and the Temple orchestrated the alleged scheme with the intent to defraud the United States and with the intent to cause false statements to be made to the FEC, then it may find Ms. Hsia guilty. On the other hand, if the jury finds that Ms. Hsia's conduct in this case was motivated by a good faith belief that the Temple's property belonged to the monks and nuns, then the jury cannot find her guilty, regardless of whether it thinks that her belief or the beliefs of the Buddhists are reasonable or "true." These and similar questions of fact relating to intent or motive (as opposed to truth of falsity of a religious belief) are jury questions to be decided at trial. Accordingly, there is no need for an evidentiary hearing now. Nor is Ms. Hsia entitled to dismissal of the indictment.

III. DEFENDANT'S MOTION TO DISMISS THE INDICTMENT BECAUSE IT SELECTIVELY PROSECUTES MARIA HSIA

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[14] The government also argues that defendant must establish (either on this motion or in defense at trial) "that it is an element of the religion that monastics must make political contributions, and that the Temple must reimburse monastics for such contributions." Gov't Response to Def.'s Supplement to Motion to Dismiss at 4. Quite obviously, that is *not* the issue for this Court or for the jury. The issues of fact relate to whether there is a communal pot from which personal expenses come—whether they be for food, clothing or political contributions.

Ms. Hsia claims that the Campaign Finance Task Force selected her for prosecution because she is Asian, in violation of the equal protection guarantee of the Due Process Clause of the Fifth Amendment. Ms. Hsia contends that the government's impermissible motivation requires dismissal of the indictment or, at the very least, limited discovery to perfect her ability to demonstrate discriminatory intent and effect. The Court concludes that Ms. Hsia. has failed to present "clear evidence" that the decision to prosecute her had a discriminatory effect and was motivated by a discriminatory purpose, and she therefore is not entitled to dismissal of the indictment. See United States v. Armstrong, 517 U.S. 456, 464 (1996); United States v. Magana, 127 F.3d 1, 8-9 (1st Cir. 1997). While she has provided "some evidence tending to show" that the prosecutorial decision both was motivated by a discriminatory purpose and had a discriminatory effect, the government in response has provided evidence that it has not discriminated against her or acted from impermissible motives. In view of the sensitive nature of the discovery sought, the fact that the government has proffered a legitimate explanation to rebut Ms. Hsia's showing of discriminatory intent and the fact that Ms. Hsia's showing of discriminatory effect is not particularly strong, the Court will exercise its discretion to deny Ms. Hsia's request for limited discovery. See United States v. Armstrong, 517 U.S. at 469.

A defendant bringing a selective prosecution claim carries a very heavy burden because there is a strong presumption that prosecutors are properly discharging their official duties. See United States v. Armstrong, 517 U.S. at 464. So long as the prosecutor has "probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion." Bordenkircher v.

Hayes, 434 U.S. at 364; see United States v. Wayte, 470 U.S. 598, 607 (1985) (prosecutor in better position than court to assess "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan"). The reluctance of courts to look behind a prosecutor's charging decision rests in part on separation of powers principles and in part on a recognition that the public prosecutor, constrained by the ethics of the legal profession and the oath to uphold the Constitution and laws of the United States, will act properly and exercise reasoned discretion. In the case of a Justice Department prosecutor, the courts' reluctance to intervene is also based on a level of judicial confidence in the systems of checks and balances and review at various levels of the Department of Justice and its hierarchy of full-time, experienced professional prosecutors, up to and including the Attorney General. Judicial deference has been accorded to the Executive in these matters precisely because it has been earned, that is, because discretion traditionally has been exercised. It is, of course, quintessentially the responsibility of the judiciary to deal—and to deal firmly—with prosecutorial overreaching or abuse of power.

Prosecutorial discretion is not unlimited, and its exercise is subject to constitutional constraints. United States v. Batchelder, 442 U.S. at 125. A prosecutor may make legitimate choices but may not select to prosecute an individual on the basis of race, religion or other arbitrary classifications. United States v. Armstrong, 517 U.S. at 464 (*citing* Oyler v. Boles, 368 U.S. 448 (1962)). Thus, even where "the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their

rights, the denial of equal justice is still within the prohibition of the constitution." Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

In order to prevail on a selective prosecution claim and to obtain dismissal of an indictment, a defendant must clearly establish (1) that the prosecutorial decision was motivated by a discriminatory purpose or intent, and (2) that it had a discriminatory effect. United States v. Armstrong, 517 U.S. at 464. Discriminatory purpose may be established either with direct evidence of intent or with "evidence concerning the unequal application of the law, statistical disparities and other indirect evidence of intent." Branch Ministries v. Richardson, 970 F. Supp. 11, 17 (D.D.C. 1997); see King v. Palmer 778 F.2d 878, 881 (D.C. Cir. 1985). A showing of discriminatory effect requires the defendant to demonstrate that similarly situated persons of other races, religions, national origin or ethnicity have not been prosecuted. For obvious reasons, the selective prosecution standard is a "demanding one," and the defendant must present "clear evidence" of both discriminatory intent and effect to establish her claim. See United States v. Armstrong, 517 U.S. at 463, 465.

Similarly, because granting discovery with respect to a selective prosecution claim may require an examination of investigative files or secret grand jury materials, including information relating to ongoing investigations in other cases, and "will divert prosecutors' resources and may disclose the Government's prosecutorial strategy . . . [there is] a correspondingly rigorous standard for discovery in aid of such a claim." United States v. Armstrong, 517 U.S. at 468. Absent a direct admission of discriminatory intent or purpose, a defendant seeking to obtain discovery must provide "some evidence tending to show the existence" of each of the two essential elements of her selective

prosecution claim: (1) that her prosecution was improperly motivated, and (2) that she was singled out for prosecution from among others similarly situated. See United States v. Armstrong, 517 U.S. at 469; United States v. Al Jibori, 90 F.3d 22, 25 (2d Cir. 1996); Branch Ministries v. Richardson, 970 F. Supp. at 16. To make out such a "colorable claim" sufficient to warrant discovery, the defendant must provide something more than mere speculation or "personal conclusions based on anecdotal evidence," but the standard necessarily is lower than the "clear evidence" standard required for dismissal of the indictment. See United States v. Armstrong, 517 U.S. at 470.

Until 1996, the Public Integrity Section of the Criminal Division of the Department of Justice had primary responsibility for investigating and prosecuting criminal violations of FECA and campaign finance violations generally. In November 1996, however, the Attorney General created the Campaign Financing Task Force to investigate and prosecute campaign finance abuses stemming from the 1996 election cycle. Since its creation, the Task Force has initiated prosecutions against eleven individuals, including Ms. Hsia. Of those eleven individuals, nine are Asian or Asian American.[15] Ms. Hsia claims that the Task

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[15] The nine Asians or Asian Americans are: Maria Hsia, Charlie Trie, Antonio Pan, Johnny Chung, Pauline Kanchanalak, Duangnet "Georgie" Kronenberg, Nora Lum, Gene Lum and Trisha Lum. The two individuals who are not of Asian descent are Michael Brown (an African American) and Howard Glicken (a Caucasian American). Mr. Brown, Mr. Glicken, and Ms. Trisha Lum have pleaded guilty to misdemeanor violations of FECA. Mr. Gene Lum and Ms. Nora Lum have each pleaded guilty to a felony, conspiracy under 18 U.S.C. § 371. Mr. Chung has pleaded guilty to a variety of felony charges. The remaining five defendants have been indicted for multiple felonies and the cases are pending. Ms. Hsia has been indicted on six felony counts.

Force has impermissibly selected her for prosecution on the basis of her Asian ancestry.[16]

The government does not dispute that *nine* out of a total of *eleven* or 82% of the individuals that the Task Force has prosecuted are Asian or Asian-American. Moreover, the two non-Asians have been charged only with misdemeanors, while eight of the nine Asians and Asian Americans face or have faced felony charges. Because the Task Force to this point has returned only eleven indictments, the sample available to Ms. Hsia is quite small. Nevertheless, the statistical disparity could, if left unexplained, suggest a discriminatory purpose or motive.

In an attempt to explain why nine of the eleven cases brought by the Task Force have involved Asians or Asian Americans, the government stated at oral argument:

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[16] Ms. Hsia contends that the Campaign Financing Task Force, rather than the Department of Justice as a whole, is the relevant prosecutorial entity for selective prosecution analysis, and the government agrees. Gov't Memorandum in Opposition to Def's Motions at 73. See McClesky v. Kemp, 481 U.S. 279, 292 (1987); United States v. Gomez-Lopez, 62 F.3d 304, 306 (9th Cir. 1995).

The government has represented that the primary focus of the Task Force is "on allegations of wrongdoing in connection with the 1996 federal election cycle," Gov't Supplemental Response on Selective Prosecution Issue at 1, and the Court therefore will use that as the defining scope of the Task Force's prosecution authority for purposes of determining whether there are similarly situated persons that the Task Force could have prosecuted but chose not to prosecute. To the extent, however, that the Task Force also has made decisions to prosecute people such as Mr. Glicken, Mr. Brown and the Lums for violations outside of the 1996 federal election cycle, information about those prosecutions is relevant to the selective prosecution analysis because prosecutorial judgments made by the same decisionmakers are relevant to a consideration of their purpose or intent in this case.

> Well, Your Honor, I think that everyone knows the reason why this whole Task Force developed in part because of the allegations that arose in October of 1996 concerning John Huang's activities and the activities on the West Coast and the allegations that surfaced.
>
> As a matter of fact, one of the first, if not the first allegation involved the Hsi Lai Temple and the potential illegal contributions that flowed from various events at the Temple.
>
> So, Your Honor, initially the government was pointed in that direction by the press and by things that came out concerning the community out in the Los Angeles area, specifically John Huang, and among the first people who it was alleged had engaged in potentially illegal conduct were Charlie Trie, Maria Hsia, Pauline Kanchanalak, the other people who were indicted.
>
> . . . [A]nd the Government received some of its information from those sources . . . through the press and others.

Transcript at 59-61. The government also acknowledged that some of the press reports on which it relied related to testimony and statements made at congressional hearings. Id. at 61. The government maintains, however, that its charging decisions have not been influenced by the press or by Congress.

At the time of argument on this motion, it appeared from the public record that the only connections between Mr. Huang, Mr. Trie, Ms. Hsia and Ms. Kanchanalak were (1)

that they are Asian or Asian American, and (2) that they were indicted by the Task Force grand jury. There was no suggestion that the four people mentioned acted in concert or that the violations they allegedly committed were connected or that all of them were connected to "the West Coast" and to John Huang. If the only commonality between the four was their Asian ancestry, the government's general statements at argument would be insufficient to explain away the statistics and might leave a colorable basis for Ms. Hsia's claim that the prosecutors' decision to prosecute her for felonies was motivated by discriminatory intent or motive. See United States v. Al Jibori, 90 F.3d at 26.

Since the argument, however, the government has provided a bill of particulars indicating that there was indeed a connection between Ms. Hsia, her California-based co-conspirators and Mr. Huang and that they did act in concert. It has indicated that it intends to prove at trial that Ms. Hsia met John Huang at the Hsi Lai Temple and that one of the monastics provided checks either to the defendant or to Mr. Huang. See Bill of Particulars at 6, 18-19. Furthermore, recent press accounts indicate that a central feature of the case against Pauline Kanchanalak and her co-defendant, Duangnet "Georgie" Kronenberg, was a Democratic-sponsored coffee with the President that John Huang orchestrated and that Ms. Kanchanalak and Ms. Kronenberg attended with Mr. Huang on June 18, 1996. See Robert L. Jackson and Ronald J. Ostrow, *Primary Target Charged in Probe of Clinton Donors*, L.A. Times, July 14, 1998, at A1. See also United States v. Kanchanalak, Criminal No. 98-0241 (D.D.C.), Indictment at ¶ 51. Thus, the government has provided evidence of more of a connection between Mr. Huang and Ms. Hsia, Ms. Kanchanalak and Ms. Kronenberg than originally appeared and has demonstrated that the Huang and West Coast connections have some factual basis. Its explanation of why at least four of the nine Asians or

Asian Americans have been indicted provides a legitimate non-discriminatory motive for the prosecutions.[17]

While the government has offered an explanation to rebut Ms. Hsia's statistical showing of discriminatory intent or motive, intent is difficult to establish without some discovery. See Branch Ministries v. Richardson, 970 F. Supp. at 17. Accordingly, if her evidence of discriminatory effect were stronger, Ms. Hsia probably would have a sufficient showing to warrant some discovery. Ms. Hsia's showing of discriminatory effect, however, is quite fragile.[18]

In order to establish discriminatory effect, Ms. Hsia must provide evidence that there are individuals or entities who (1) are not Asian or Asian-American, (2) committed similar offenses in connection with the 1996 federal election cycle, and (3) have not been prosecuted by the Task Force. See Attorney General v. The Irish People, Inc., 684 F.2d 928, 946 (D.C. Cir. 1982), *cert. denied,* 459 U.S. 1172 (1983). The government contends that Ms. Hsia has pointed to no similarly situated persons who have not been prosecuted by the Task Force, but that is not so. Ms. Hsia

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[17] The government also has represented that the prosecution of Nora Lum, Gene Lum and Tricia Lum, three of the Asians prosecuted by the Task Force, "while within the purview of the Task Force, was initiated by the independent counsel investigating former Cabinet member Ronald Brown, and was brought to the Task Force by an attorney who formerly worked for that independent counsel." Gov't Supplemental Response c Selective Prosecution Issue at 1.

[18] If the Court were inclined to grant discovery, it would at the very least require disclosure of any documents in the possession of the Task Force that specifically refer to Asian ancestry as a factor to be considered in investigating and prosecuting campaign finance violations or that in any way indicate that the Task Force should focus its attention on Asians or Asian Americans, including any information respecting pressure from the Congress.

initially pointed to at least 13 and perhaps as many as 39 instances in which she maintains that similarly situated non-Asian individuals and entities were not prosecuted. Def's Motion to Dismiss Indictment Because It Selectively Prosecutes Maria Hsia at 4-10. While on closer analysis it appears that only two of the instances identified in her initial filing, General Cigar Company, Inc. ("GCC") and Elgin Builders, Inc., may have been similarly situated, the alleged violations in those two instances do bear similarities to the alleged violations in Ms. Hsia's case.

In both cases, the FEC investigated concealment violations committed during the 1996 federal election cycle and found reason to believe that those persons and entities had violated the law. See Def's Motion 10, Exh. 4-5, 21. In both cases, the laws that the FEC found reason to believe the individuals had violated are the same laws that form the basis for the charges in Ms. Hsia's case: the prohibition against contributions in the name of another and the prohibition against corporate contributions. To date, however, none of the individuals or entities involved in those two schemes has been prosecuted by the Task Force.[19]

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[19] In the GCC case, the General Counsel of the FEC recommended that the FEC "find reason to believe" that GCC and a number of its executives "knowingly and willfully" violated FECA's corporate contribution prohibition, 2 U.S.C. § 441b, and FECA's prohibition of contributions in the name of another, 2 U.S.C. § 441f. The respondents entered into the FEC's conciliation process and ultimately agreed to pay an $80,000 fine. Def's Motion No. 10, Exh. 4. It appears that none of the corporate officials implicated in the scheme was Asian or Asian American, and none was prosecuted by the Task Force despite the fact that the FEC found reason to believe that the company and its officials had violated the same provisions of FECA that form the basis for the charges in Ms. Hsia's case.

In the Elgin Builders case, the FEC investigated allegations that Elgin Builders funneled money into the campaign of the

In a recent filing, Ms. Hsia also argues that the Task Force has made a decision not to prosecute Haley Barbour (a Caucasian American), the former Chairman of the Republican National Committee ("RNC"), with respect to foreign contributions and possibly false statements made to the FEC in RNC reports. See Supplement to Motion to Dismiss Indictment Because It Selectively Prosecutes Maria Hsia at 2-3. The allegations against Mr. Barbour and the allegations in the indictment against Ms. Hsia undoubtedly both involve campaign finance improprieties, but the alleged schemes in the two situations appear to be different. Ms. Hsia characterizes Mr. Barbour's offense as one in which the Republican National Committee "received foreign money in the form of a 'loan' from a related organization." Id. at 2. While Ms. Hsia may be correct that *"no-one* should be held to a higher standard than an individual who heads a national political party," id. at 2 (emphasis in original), her

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Clinton/Gore Primary Committee, Inc. through its employees. See Def's Motion No. 10, Exh. 21. As with the scheme at issue in GCC, the FEC found reason to believe that Elgin Builders and one of its officials "knowingly and willfully" violated FECA's corporate contribution prohibition, 2 U.S.C. § 441b, and FECA's prohibition of contributions in the name of another, 2 U.S.C. § 441f. See id. at 9. The race and national origin of the corporate official who allegedly committed the violation is unclear from his name. He apparently has not been prosecuted.

Ms. Hsia's case allegedly involved $125,000 in conduit contributions, while GCC involved only $11,000 and Elgin Builders only $4,000—facts that arguably distinguish the cases. In GCC, however, it appears from the General Counsel's Report that there may have been additional contributions that would have increased the amount at issue. Moreover, it appears that there were aggravating circumstances in the GCC case such as the time period over which the scheme allegedly occurred and the fact that there were a number of contributions at issue that might have made this a case similar to Ms. Hsia's. Def's Motion No.10, Exh. 5 at 3.

characterization of Mr. Barbour's situation, even if true, raises additional complexities not present in her case. The two cases therefore are not similar.

The Court is left with only two arguably similar cases to establish discriminatory effect. If Ms. Hsia had provided stronger evidence of discriminatory intent or if the government had not proffered a legitimate explanation of the glaring statistics, the showing of discriminatory effect may have constituted a "colorable basis" sufficient to warrant discovery. Cf. United States v. Al Jibori, 90 F.3d at 25. Under the circumstances, however, the Court cannot conclude that Ms. Hsia has met the rigorous standard set forth in Armstrong. In view of the facts alleged in the bill of particulars and in the Kanchanalak/Kronenberg indictment, as well as those contained in an ex parte, in camera submission filed by the government and accepted for consideration by the Court, the Court concludes that discovery into the prosecutorial process is not warranted.[20]

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[20] Finally, it is worth noting that the facts proffered by Ms. Hsia necessarily are based on incomplete information and are premised on an assumption that none of the cases she has cited (or perhaps others) is presently being investigated by the Task Force. The cases indicted by the Task Force grand jury to date may be but the tip of a larger iceberg and the public snapshot of what ultimately may be a much wider panorama of campaign finance prosecutions. To the extent that an investigation is ongoing, the Task Force has not yet "chosen" not to prosecute those individuals or entities it is investigating, and requiring the government to disclose information about them would pose a significant threat to the government's ability later to do so. On this record, the Court declines to order discovery.

IV. DEFENDANT'S MOTION TO DISMISS CONSPIRACY COUNT FOR FAILURE TO STATE AN OFFENSE

The indictment alleges in Count 1 that Ms. Hsia "knowingly and willfully" conspired to defraud the United States, by impairing, obstructing, impeding, and defeating the lawful functions and duties of the FEC and the INS in violation of 18 U.S.C. § 371. Indictment at 4. Ms. Hsia has moved to dismiss the conspiracy count for failure to state an offense or, in the alternative, to strike the Immigration and Naturalization Service as an object of the conspiracy.

Ms. Hsia asserts that the conduct alleged in the indictment has only an attenuated connection to the FEC and virtually no connection to the INS and that the indictment does not allege that any function of the FEC or the INS was impaired by the alleged conduct. Ms. Hsia appears to be making the general argument that the offense of "conspiracy to defraud the United States" under 18 U.S.C. § 371 must be construed narrowly and that the connection between her conduct and the agencies is too attenuated to state a Section 371 offense. See Hammerschmidt v. United States, 265 U.S. 182 (1924). The Court disagrees.

The conspiracy count alleges that the FEC is an agency of the United States government "entrusted with the responsibility of enforcing the reporting requirements of the FECA . . . and responsible for making available to the public certain information about the amounts and sources of political contributions to federal candidates and their political committees," and that the INS is an agency of the United States government entrusted with the responsibility of enforcing the Immigration and Nationality Act, including a provision applying to religious workers who can obtain special visas to enter or remain in the United States "for the

purpose of working for a bona fide nonprofit religious organization." Indictment at ¶¶ 6-8. The indictment next alleges that Ms. Hsia and other named and unnamed co-conspirators entered into an agreement to prevent the INS and the FEC from learning that IBPS, a corporation, had unlawfully made political contributions. Finally, the indictment alleges a series of overt acts taken by Ms. Hsia and her alleged co-conspirators to prevent the INS and the FEC from learning about the illegal contributions, including the implementation of an elaborate conduit scheme to conceal from the FEC the fact that IBPS was making political contributions and the submission of a document to the INS indicating that "IBPS had not participated in any political campaign." Indictment at ¶¶ 40(d), (e), (k), (l).

While Ms. Hsia is correct that in order to establish a conspiracy to defraud the United States the government must prove that the object of the conspiracy was to obstruct a specific function of a government agency, see United States v. Haga, 821 F.2d 1036, 1041 (5th Cir. 1987), the indictment in this case clearly alleges that the object of the conspiracy was to obstruct specific functions of specific agencies. With respect to the FEC object of the conspiracy, the indictment specifically states that one of the functions of the FEC is to enforce the various provisions of FECA, including its prohibition of corporate and conduit contributions. The object of the alleged conspiracy was to prevent the FEC from learning that IBPS in fact was violating these provisions of FECA. Indictment at ¶ 11.

With respect to the INS object of the conspiracy, the indictment specifies that one of the functions of the INS is to enforce the provision of the Immigration and Nationality Act addressing the "religious worker" program. The indictment alleges that it was an object of the conspiracy to prevent the INS from learning that IBPS gave political contributions, a

fact which may have jeopardized IBPS' eligibility for the religious worker program. Indictment at ¶ 12. The indictment therefore specifically alleges a conspiracy to impair and impede specific functions of the FEC and the INS. The government, of course, will have the burden of proving the existence of a conspiratorial agreement and the obstruction of a function of the FEC or the INS at trial, but the indictment sufficiently alleges a Section 371 conspiracy.[21]

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[21] Ms. Hsia also argues that because the conduct alleged in the indictment is proscribed by FECA, the government is required to charge her with conspiracy to violate FECA, a misdemeanor, rather than with conspiracy to defraud the United States. She relies on the Sixth Circuit's opinion in United States v. Minarik, 875 F.2d 1186, 1194 (6th Cir. 1989) (conspiracy whose objective is "covered by a specific offense defined by Congress" must be prosecuted "exclusively under the offense clause" of Section 371 rather than under the defraud clause). The Court does not find this argument persuasive.

While the language of Minarik was very broad, the Sixth Circuit has subsequently narrowed the holding in Minarik quite significantly. See United States v. Khalife, 106 F.3d 1300, 1304-06 (6th Cir. 1997), *cert. denied,* 118 S. Ct. 685 (1998); United States v. Kraig, 99 F.3d 1361, 1367-68 (6th Cir. 1996); United States v. Sturman, 951 F.2d 1466, 1473-74 (6th Cir. 1991), *cert. denied,* 504 U.S. 985 (1992); United States v. Mohney, 949 F.2d 899, 901-03 (6th Cir. 1991), *cert. denied,* 504 U.S. 910 (1992). Minarik also has been limited to the peculiar factual circumstances presented there: (1) the government's theory of conspiracy shifted throughout the case, a problem that was magnified by the fact that the indictment did not allege the specific functions of the agency that allegedly were impeded; (2) the defendants' alleged criminal conduct consisted of one limited act of concealment, a fact that made the breadth of the alleged conspiracy incommensurate with the Minarik court's conception of a general conspiracy to defraud; and (3) the duties at issue were highly technical. See United States v. Khalife, 106 F.3d at 1304-06.

As for Ms. Hsia's alternative request that the Court strike the INS as an object of the conspiracy, the Court's initial concerns about whether there was any evidence of a connection between Ms. Hsia's activities and the lawful functions of the INS, see Opinion of August 13, 1998 at 30-3 1, have been allayed by the government's bill of particulars. See Bill of Particulars at 9-13 ("From 1993 through 1996, the defendant and IBPS concealed that the Temple was the true source of funds for contributions to local, state and federal candidates, and provided false and misleading documentation to the INS in connection with I-129 and 1-360 petitions for persons to work at the Hsi Lai Temple . . . Based upon the false and misleading documentation in the applications, the INS took no action to investigate the Temple's activities or tax status, and generally approved the applications with dispatch"). The INS therefore will not be stricken as an object of the conspiracy.

V. MOTIONS TO DISMISS FALSE STATEMENTS COUNTS

Counts 2-6 of the indictment charge Ms. Hsia with having caused various political committees to make false statements to the FEC in violation of 18 U.S.C. §§ 1001 and 2(b). Section 1001 provides, in relevant part, that

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The same factual scenario is not presented in this case. The indictment charging Ms. Hsia with conspiracy identifies the specific functions of the agencies that allegedly were impaired or impeded. See supra at 37-38. Moreover, the conduct alleged in Ms. Hsia's indictment spans over a long period of time, implicates several provisions of FECA and impaired or impeded more than one governmental agency. While the government *could* have charged Ms. Hsia with conspiracy to violate FECA, the object of the conspiracy here clearly involved much more than a conspiracy to violate FECA, and it was weil within the government's discretion to choose to charge her under the defraud clause of Section 371.

"whosoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry" shall be held criminally liable. 18 U.S.C. § 1001. Section 2(b) provides that "[w]hoever willfully *causes* an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." 18 U.S.C. § 2(b) (emphasis added).

All of the false statements counts allege that Ms. Hsia "knowingly and willfully caused the submission of a material false statement to the FEC" by causing a federal political committee to file a report with the FEC that listed certain individuals as "contributors" when Ms. Hsia "knew, in truth and in fact, [that] the individuals named in the report were not the actual contributors." See, e.g., Indictment at ¶ 43. Each of the five counts alleges that Ms. Hsia solicited the contributions that led to the making of false statements by the political committees; Count 6 also alleges that in one case Ms. Hsia acted as one of the conduits. Indictment at ¶ 54. The indictment does not identify the "actual" contributor in Counts 2 and 3, but it alleges that the "actual" contributor in Counts 4-6 was the Hsi Lai Temple. The government has specified that the "false statements" are the names of the "contributors" listed by the political committees in their reports to the FEC and that the political committees took the names from the signature line of the checks submitted to them. The falsity, according to the government's theory, stems from the fact that the names listed on the reports are not the names of the "actual" contributors but instead are the names of the "conduits" who signed the checks.

To recite the bare factual allegations of the indictment and the words of Sections 1001 and 2(b), however, does not capture the Alice-in-Wonderland-like maze of logical leaps and tangled inferences that are required in order to find that this indictment adequately alleges Section 1001 and 2(b) violations or to find that anyone in Ms. Hsia's position would be on notice that her alleged conduct violated these statutes. At every turn, one encounters another place where the government's theory defies logic and stretches almost beyond recognition the two criminal statutes on which it relies. Only by invoking the most highly technical and inventive reasoning does the indictment even arguably allege conduct that constitutes the essential elements of the offense: false statements, causation, and knowing and willful conduct. While inventive and clever applications of statutes may have their place in some legal settings, they have no place in an indictment charging someone with serious felonies for conduct that implicates several of the protections of the First Amendment and has such a tenuous relationship to the ultimate submission of a false statement to the FEC. The Court concludes that any finding that the conduct alleged in the indictment constitutes a false statements offense would require an impermissibly strained reading of Sections 1001 and 2(b). These counts therefore must be dismissed.[22]

One of the fundamental problems with the indictment is that it provides no details with respect to how the conduct alleged constitutes the essential elements of the offenses charged. Each of the essential elements is included only by virtue of the fact that the indictment faithfully recites the words of the statutes: Ms. Hsia "knowingly and willfully"

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[22] In view of the Court's decision to dismiss Counts 2-6, it is unnecessary to address the arguments raised in Ms. Hsia's Motion No. 7, to Dismiss Counts 4 & 5 for Failure to State an Offense (Soft Money).

"caused" the submission of "false statements" to the FEC. Generally, of course, it is sufficient for an indictment to charge the criminal offense in the words of the statute itself, provided that those words "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." Hamling v. United States, 418 U.S. 87, 117 (1974) (quoting United States v. Carll, 105 U.S. 611, 612 (1882)). The bare recitation of the statutory language, however, must also be "accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which [she] is charged." Id. Especially where "the statutory definition of an offense employs generic terms, it is not sufficient to charge the offense in the same terms employed by the statute; the indictment must 'descend to particulars.'" United States v. Sullivan, 919 F.2d 1403, 1411 (10th Cir. 1990) *(quoting* Russell v. United States, 369 U.S. 749, 765 (1962)). See also United States v. Salisbury, 983 F.2d 1369, 1375 (6th Cir. 1993).

This specificity requirement serves several purposes required by the Constitution and identified by the Supreme Court over a century ago. First, there is the "fair notice requirement that the indictment must furnish the defendant with "such a description of the charge" against her so that she is able to "make [her] defense." United States v. Cruikshank, 92 U.S. 542, 558 (1875). Second, the indictment must allege the conduct being charged with sufficient particularity that the defendant can raise her conviction or acquittal as a bar to future proceedings based on the same conduct. Hamling v. United States, 418 U.S. at 117. Finally, the indictment must be sufficiently detailed to "inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not

conclusions of law alone." United States v. Cruikshank, 92 U.S. at 558.

In this case, it is not clear how the alleged conduct satisfies any of the essential elements of the two statutes that are invoked. The elements are so hopelessly entangled that it is impossible for either the Court or Ms. Hsia to determine precisely what conduct on her part has subjected her to prosecution on these charges. See United States v. Salisbury, 983 F.2d at 1375 (dismissing indictment because it "fails to adequately notify the defendant of the specific occurrences which constituted the charges against her"). For instance, because it is not at all clear from the indictment *whether* or *how* the statements are false, it is difficult to determine whether Ms. Hsia "caused" the false statements to be made by taking actions to mislead someone else into making affirmatively "false" statements or whether she "caused" the false statements by taking some action that was independent of the making of the statement and that made the statements false. Similarly, because the indictment does not clearly articulate what "act" by Ms. Hsia "caused" the false statements, it is difficult, if not impossible, to determine whether Ms. Hsia could have taken that act with the requisite knowledge to meet the "willful" intent element. Because the facts and circumstances alleged in the indictment appear to be only tangentially related to the offenses charged, the Court would have to read Sections 1001 and 2(b) very broadly indeed in order to find that the indictment serves the purposes constitutionally required of an indictment and that it adequately alleges violations of those statutes.

The problem is exacerbated by the fact that the indictment in this case charges conduct in an area that is permeated by First Amendment considerations, and overly broad or vague applications of the statutes invoked therefore are constitutionally impermissible. Because limitations on

campaign contributions "operate in an area of the most fundamental First Amendment activities," Buckley v. Valeo, 424 U.S. at 14, any regulation of campaign contributions is subject to close scrutiny to ensure that the government's interest in regulating that activity outweighs any burden on the First Amendment and to ensure that the legislation is carefully tailored and "closely drawn" to protect the First Amendment rights at issue. Id. at 25.[23] All the more so when criminal sanctions are involved and when a prosecutor goes outside the carefully structured regulatory scheme provided by Congress in devising a theory of prosecution.

The combination of the First Amendment interests at stake and the threat of a criminal prosecution necessitates a close examination of any indictment to ensure that the statutes utilized are neither overly vague nor overly broad in their language or in their application. See Buckley v. Valeo, 424 U.S. at 40-41 (close examination required where legislation imposes criminal penalties "in an area permeated by First Amendment interests"); id. at 76-77 (in analyzing independent expenditure disclosure provision, Court conducts First Amendment vagueness analysis, noting that

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[23] Admittedly, there is some disagreement among the circuits concerning the precise level of protection afforded to campaign contributions. Compare Akins v. Federal Election Commission, 101 F.3d 731, 741 (D.C. Cir. 1996) *(en banc), vacated on other grounds,* 118 S. Ct. 1777 (1998) (campaign contributions entitled to less First Amendment protection than campaign *expenditures,* and regulation of campaign contributions therefore merits less exacting scrutiny than regulation of campaign expenditures), with Russell v. Burris, 146 F.3d 563, 567 (8th Cir. 1998) ("Government attempts to limit campaign contributions . . . are subject to the closest scrutiny . . . a significant interference with protected rights of political association may be sustained only when the state demonstrates a compelling interest and means closely drawn to avoid unnecessary abridgement of associational freedom") (internal citations and quotations omitted).

"the provision raises serious problems of vagueness, particularly treacherous where, as here, the violation of its terms carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights"); see also Grayned v. Rockford, 408 U.S. 104 (1972) (even a "clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct"). The due process doctrines of vagueness and overbreadth together guard against "the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of the sanctions." NAACP v. Button, 371 U.S. 415, 433 (1963).[24]

The doctrine of vagueness incorporates notions of fair notice and fair warning. Smith v. Goguen, 415 U.S. 566, 572 (1974). At its most fundamental, it operates to ensure that "no [woman] shall be held criminally responsible for conduct which [she] could not reasonably understand to be proscribed," Buckley v. Valeo, 424 U.S. at 77 (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)), and "due process bars courts from applying a novel [or strained] construction of a criminal statute to conduct that neither the

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[24] While the Court in Buckley ultimately upheld the *facial* constitutionality of the carefully tailored contribution limits and disclosure provisions of FECA, it did so only after conducting a thorough analysis of those provisions to ensure that they did not unduly infringe on the First Amendment rights at issue. It would be peculiar indeed if the application of criminal statutes that are much broader than FECA to the same type of conduct at issue in Buckley were not subject to at least the same level of scrutiny to ensure that First Amendment interests were not being unduly burdened.

statute nor any prior judicial decision has fairly disclosed to be within its scope." United States v. Lanier, 117 S. Ct. 1219, 1225 (1997). Where a statute reaches expression protected by the First Amendment, "the doctrine demands a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. at 573.[25]

The overbreadth doctrine is aimed at laws that are drafted so broadly that they sweep within their scope both expression that is protected by the First Amendment and unprotected expression or conduct. The doctrine is "predicated on the sensitive nature of protected expression: 'persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'" New York v. Ferber, 458 U.S. 747, 768 (1982) *(quoting* Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980)). Because the vice of an overly broad statute is the risk that it will encompass both protected and unprotected expression or conduct, the

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[25] The "fair notice" protections of the vagueness doctrine are substantively different from the "fair notice" requirements for the sufficiency of an indictment discussed supra at 42-43. The fair notice requirement of the vagueness doctrine protects people from the application of *statutes* that are so vague that a reasonable person has no notice that her conduct might be proscribed by that statute. It is based on the Due Process Clause of the Fifth Amendment. See Note, *The Void for Vagueness Doctrine in the Supreme Court,* 109 U. Pa. L. Rev. 67 (1960). The requirement that an *indictment* must provide fair notice, by contrast, protects a defendant's right to an indictment that is detailed enough so that she can prepare a defense and be protected against double jeopardy. It is based on the Fifth Amendment grand jury indictment requirement, the Fifth Amendment's Double Jeopardy Clause and the Sixth Amendment's right to be informed of the nature and cause of the accusation. See Russell v. United States, 369 U.S. at 770-71; United States v. Cruikshank, 92 U.S. at 557-58.

Supreme Court has entertained attacks on such statutes "even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." New York v. Ferber, 458 U.S. at 769.[26]

There is no doubt that the conduct charged here could constitutionally be "proscribed by a [criminal] law drawn with the requisite specificity," New York v. Ferber, 458 U.S. at 769, and that the conduct in fact has been proscribed, at least in part, by Congress in FECA. See 2. U.S.C. § 441f. ("No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect

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[26] "[T]he doctrines of vagueness and overbreadth are not entirely distinct, and . . . the vices of vagueness and overbreadth are not wholly separable, in the area of the first amendment." Note, *The First Amendment Overbreadth* Doctrine, 83 Harv. L. Rev. 844, 873 (1970). The twin vices addressed by the doctrines of vagueness and overbreadth are the lack of fair warning and notice that someone's conduct may be subject to the criminal sanction and, because First Amendment protections are implicated, the threat that the overbroad language or application of a statute may chill protected speech by coercing people to leave protected utterances unspoken even when they are protected by the Constitution. Note, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. at 76. The due process vices of facially vague statutes -- lack of fair warning and lack of adequate standards or guidance -- are the same vices that have led the Supreme Court to define the permissible reach of an overbroad statute more narrowly rather than to strike it down entirely. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. at 872-75. See Boos v. Barry, 485 U.S. 312, 330 (1988); New York v. Ferber, 458 U.S. at 773; Buckley v. Valeo, 424 U.S. at 76-77; Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Cf. United States v. Nofziger, 878 F.2d 442, 453-54 (D.C. Cir.) (court of appeals reverses conviction by invoking third related doctrine, rule of lenity, to impose *mens rea* requirement on ambiguous statute in First Amendment area where statute itself did not clearly provide *mens rea*), *cert. denied*, 493 U.S. 1003 (1989).

such a contribution . . . ."). Nor is there any doubt that Congress could conclude that felony rather than misdemeanor penalties are appropriate for the conduct it proscribes. See supra at 13 n.9. The issue in this case is whether charging the conduct described in the indictment under Sections 1001 and 2(b) would require a constitutionally overbroad or vague application of those statutes to this conduct.

The facial constitutionality of Sections 1001 and 2(b) is not at issue. They have been applied in a myriad of contexts and to a wide variety of conduct since the turn of the century, even in some cases where the First Amendment arguably was implicated. See, e.g., United States v. Rodgers, 466 U.S. 475, 484 (1984) (Section 1001 constitutional as applied to defendant who made false report to FBI and Secret Service); United States v. Daly, 756 F.2d 1076, 1081-82 (5th Cir.) (Sections 1001 and 2 constitutional as applied to scheme setting up churches to avoid income tax because jury considered only whether religious beliefs were truly held, not truth or falsity of beliefs), *cert. denied* 474 U.S. 1022 (1985). In this case, however, it requires an extraordinarily deft and clever reading of the false statements statute and Section 2(b) to discern the basic elements of the offense as applied to the conduct alleged: (1) a false statement, (2) a causal link between Ms. Hsia and the false statement, and (3) the requisite knowledge and intent. In the face of an indictment that so obscurely charges violations of Sections 1001 and 2(b), the due process doctrines of overbreadth and vagueness prevent this Court from stretching Sections 1001 and 2(b) so far beyond their generally accepted scope to reach the conduct alleged.

For starters, it is a battle to find the false statements in the indictment. A false statement is an essential element of a prosecution under 18 U.S.C. § 1001, and if the statement at

issue is literally true a defendant cannot be convicted of violating Section 1001. See Bronston v. United States, 409 U.S. 352, 357-58 (1973) (unresponsive statement, even if intended to deceive, insufficient to sustain conviction of perjury); United States v. Milton, 8 F.3d 39, 45 (D.C. Cir. 1993), *cert. denied,* 513 U.S. 919 (1994) ("Falsity is an essential element of the section 1001 offense").[27] The indictment in this case alleges that the "false statements" are the names of people who were "falsely identified" as contributors in the political committees' reports to the FEC. Ms. Hsia argues that the reports filed by the political committees make no factual assertions that the persons listed are the "true" or "actual" sources of the receipts, and she is quite right that the reports and the attached schedules do not expressly assert that the names listed are the "true sources" of the contributions.

The government contends, however, that those reports, when read in conjunction with the accompanying regulations and statutory provisions, imply an assertion that the listed names are the "true sources" of the contributions. This argument would make sense if a political committee treasurer or some other sophisticated committee official who

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[27] It is not entirely clear whether the literal truth of a statement is grounds for dismissal of an indictment or whether it operates only as a defense at trial. See, e.g., United States v. Milton, 8 F.3d at 45; United States v. Dale, 991 F.2d 819, 832-33 (D.C. Cir.), *cert. denied,* 510 U.S. 906 (1993). At least two courts, including this one, however, have suggested that literal truth is grounds for dismissal of the indictment. See United States v. Vesaas, 586 F.2d 101, 104 (8th Cir. 1978) ("the indictment is fatally defective in failing to set forth an offense under § 1001" when the statement is facially true); United States v. Clarridge, 811 F.S upp. 697, 712 (D.D.C. 1992) (Greene, J.) ("Bronston requires the court to dismiss the indictment only when it is plain that the government cannot prove that the defendant's statement was false").

actually made the "statement" to the FEC, knowing it was false and with the intent to deceive, had been indicted, either alone or as a co-conspirator with someone like Ms. Hsia. It is a stretch, however, to apply that reasoning here.

FECA requires political committees to exert best efforts to identify each person who makes a contribution to the political committee during the particular reporting period and whose aggregated contributions in that calendar year exceed $200 and to report that identification to the FEC. 2 U.S.C. §§ 432(i), 434(b)(3)(A). FEC regulations require "reporting committees" to exert "best efforts" to obtain the "identification" of each individual who contributes an amount in excess of $200 to the committee's federal ("hard money") account and to report that information. 11 C.F.R. § 104.8(a). The regulations specify that the "identification" shall include the individual's name, mailing address, occupation, the name of his or her employer, if any, and the date of receipt and amount of any such contribution. Id. In addition, the regulations provide that "[a]bsent evidence to the contrary, any contribution made by check, money order, or other written instrument shall be reported as a contribution that has been made by the last person signing the instrument prior to delivery to the candidate or committee." 11 C. F. R. § 104.8(c).

The itemization of the political committee's receipts generally is attached as a schedule to the summary report to the FEC of disbursements and receipts for the reporting period. The FEC has a specific form, Schedule A, on which the political committees are supposed to itemize receipts. Schedule A includes a line for the name of the committee, and then has boxes for listing various categories of information, including "Full Name, Mailing Address and ZIP Code," "Name of Employer," and "Amount of Each Receipt this Period." The itemization of receipts that contain the

alleged false statements in this case appear to be simply computer print-outs with columns of names and addresses, employers/occupations, dates, amounts and, in some cases, year to date aggregate amounts. See Def's Motion No. 6, Exh. A-E.

While political committees must exert best efforts to identify individual contributors from whom they receive contributions, the contributors themselves have no duty to disclose any identifying information to the political committees, including even their name. Republican Nat'l Comm. v. Federal Election Comm'n, 76 F.3d 400, 406 (D.C. Cir. 1996) (contributor has no duty to reveal identity to FEC or political committees), *cert. denied,* 117 S. Ct. 682 (1997). The statute and the regulations therefore place no disclosure obligation on contributors and contain a "safe harbor" provision for political committees: If the political committee exerts its "best efforts" to obtain the relevant identifying information, including mailing a one-time request for such information to the contributor, id. at 403, 406, the report of the committee "shall be considered in compliance with" FECA. 2 U.S.C. § 432(i); 11 C.F.R. § 104.7. Thus, if the contributor does not respond to the committee's request, as is her right, the committee will have no information other than the check. It then may report the last name on the check to the FEC as the presumptive "contributor," and the committee is deemed to have met its obligations. See 11 C. F. R. §§ 104.7, 104.8 (c).

Ms. Hsia argues that because the FEC's Schedule A never specifies that the political committee must list the name of the "true" or "actual" source of the contribution, the political committee's failure to list the "true" source of the contribution cannot constitute a "false statement." Ms. Hsia is correct that the political committees' reports and the attached schedules do not expressly assert that the names

listed on it are the "true sources" of the contributions. Furthermore, although the definition of the word "contribution" in FECA occupies pages of the United States Code, the statute itself never explicitly defines contribution with reference to the "true source" of the funds. See 2 U.S.C. § 431(8).[28] The government therefore is left to argue that a factual assertion that the name listed on the form is the true source of the contribution can be implied from FECA and the accompanying regulations.

There is at least a plausible argument that knowledgeable and sophisticated political committees or committee treasurers impliedly assert when they submit reports to the FEC that to the best of their knowledge the names listed on the reports are the "true sources" of the contributions. First, the regulation stating that "[a]bsent evidence to the contrary, any contribution made by check, money order, or other written instrument shall be reported as a contribution by the last person signing the instrument prior to delivery to the candidate or committee," 11 C.F.R. § 104.8(c), implies that *if there is* "evidence to the contrary" of which the political committee is aware, the committee may *not* report the contribution as having been made by the last person signing the instrument. The FEC regulation, if not the statute itself, therefore implies that the term "contributor" is not synonymous with the phrase "the last person signing the instrument" and that the political committee is supposed to identify the "true source" of a contribution if it knows the true source.

Second, FECA provides that "[n]o person shall make a contribution in the name of another person or knowingly

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[28] Neither FECA nor FEC regulations define the word "contributor." At oral argument, the government stated that a contributor is "a person who makes a contribution." Transcript at 121.

permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." 2 U. S. C. § 441f. Because the term "contribution" is used in this section of FECA in conjunction with the person who is the actual source of the funds, rather than with the "name of another person," and because the same statutory definition of "contribution" applies in every section of FECA that uses the term (with one exception not relevant here), there is an implication that the term "contributor" means the true source, rather than the person whose name has been used.[29]

The provisions of FECA and the regulations on which the Court must rely to find false statements set forth the requirements for the filing of committee reports with the FEC in terms of the obligations and knowledge of the political committee treasurer, not someone like Ms. Hsia. When the treasurer signs his or her name to such a report, it is a relatively simple matter to determine the implied assertions that are being made. If the treasurer lists a name on the committee report that comes from the payor line on a

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[29] In addition, for purposes of determining whether a person has exceeded dollar limitations on contributions, FECA specifically provides that "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient." 2 U.S. C. § 441 a(a)(8); see 11 C.F.R. § 110.6(a). This provision, however, was intended to address *legal* "conduit" contributions—for instance when an individual contributes money to a national party that is earmarked for the campaign of a certain candidate—and both the government and Ms. Hsia believe that the provision is wholly irrelevant in this case. See Transcript at 116-17, 125.

check, he or she asserts that "best efforts" have been made to obtain complete identifying information – in other words, that the treasurer has *asked for* identifying information – and that the treasurer has no evidence that the listed name is not the actual contributor. Therefore if the treasurer knowingly lists a conduit as the true contributor, he or she could properly be indicted for making a false statement under 18 U.S.C. § 1001. Similarly, if Ms. Hsia or a conduit contributor had knowingly conspired with the treasurer to have the treasurer intentionally misidentify the true contributor in a report to the FEC, there might be a legitimate charge of making a false statement or, more probably, of conspiracy to violate the false statements statute.[30]

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[30] If Ms. Hsia or one of her co-conspirators had responded to the request from a political committee for additional information and had affirmatively stated that the conduit was the true contributor, they probably could be charged with a violation of 18 U.S.C. § 1001 and 18 U.S.C. § 2(b), but under a slightly different theory. In that case, the response sent by Ms. Hsia or her co-conspirator would be an affirmative statement that the political committee essentially would directly relay to the FEC in its report. Assuming that Ms. Hsia knew that the political committee would relay her false statement to the FEC and that the other requirements for prosecution under Sections 1001 and 2(b) in the federal election context had been met, such a prosecution would be permissible. Cf. United States v. Hopkins, 916 F.2d at 214-15 (conviction under Sections 1001 and 2(b) upheld where defendant formed political action committee and directly submitted false information to committee treasurer for inclusion in committee report to FEC); United States v. Oakar, 924 F. Supp. at 242-43 (defendant, a former Congresswoman, properly charged with violating Sections 1001 and 2(b) where she made misrepresentations to campaign treasurer that resulted in falsities on financial disclosure reports).

In this case, however, Ms. Hsia and her co-conspirators remained silent and did not respond, as was their right. Republican Nat'l Comm. v. Federal Election Comm'n, 76 F.3d at 406. The only thing

The indictment here, however, does not allege that Ms. Hsia conspired with political committee treasurers to conceal from the FEC the identities of actual contributors and, absent any allegation of wrongful knowledge on the part of the political committees referred in the indictment, it is difficult to ascertain what, if any, implied assertions the political committees made in their reports and whether any of those assertions were "false." In this area of First Amendment protections, the very fact that it is necessary to draw so many inferences and assume such detailed knowledge of arcane regulations in order to find that the reports contain false statements counsels against concluding that Section 1001 reaches such "statements."

The next hurdle for the government to overcome in the due process analysis relates to the "causation" requirement of 18 U.S.C. § 2(b). Ms. Hsia argues that the indictment does not allege any conduct on her part that could have "caused" the political committees to file false statements, but alleges only that she "knew" that the "individuals named in the report[s] were not the actual contributors." See, eg., Indictment at ¶ 43. She further maintains that her *knowledge* that the reports contained false statements is insufficient to establish that she "caused" the false statements to be made. Ms. Hsia is correct, of course, that in order for the government to prove that she "caused" a false statement to be made, it must prove more than mere knowledge of falsity. It must also prove that she took some affirmative action -- engaged in some conduct -- that led the political committees to file statements with the FEC that were false, and that she acted knowingly and willfully. If the

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the conduits did was to sign blank checks in their own names at Ms. Hsia's request, and the government does not and cannot allege that the checks themselves contained false statements. See Williams v. United States, 458 U.S. 279, 284 (1982).

indictment alleged only that Ms. Hsia "knew, in truth and in fact, that the individuals named in the report were not the actual contributors," see, e.g., Indictment at ¶ 43, Ms. Hsia certainly would be entitled to dismissal of the false statements counts.

The indictment does slightly more than Ms. Hsia suggests, however. It tracks the language of the statute and alleges that Ms. Hsia "caused the submission of a material false statement to the FEC." See, e.g., Indictment at ¶43. In most cases, it would be sufficient to withstand a motion to dismiss an indictment simply to invoke the statutory word connoting the act or conduct engaged in—in this case "cause[d]—along with the mental element required by the statute, "willfully." See Hamling v. United States, 418 U.S. at 117. But where the facts alleged do not clearly constitute the conduct charged, the indictment has not served its purpose of fairly informing the accused of the offense with which she has been charged. See id.; United States v. Salisbury, 983 F.2d at 1375 (indictment alleging violation of multiple voting statute must be dismissed where none of facts alleged in indictment clearly constituted multiple voting as commonly understood). Furthermore, in the First Amendment area, due process requires the Court to consider whether the statutes invoked have been impermissibly stretched and too broadly applied. In this case, the First Amendment concerns of Buckley and the overbreadth and vagueness doctrines present insurmountable constitutional impediments to this combined Sections 2(b)/1001 prosecution for causing false statements.

At oral argument, the government proffered that it intends to prove that Ms. Hsia "caused" the political committees to make false statements by soliciting conduit contributions (or, in certain cases, that "she solicited through others") and "in certain instances that she took steps to

forward the conduit checks to the respective committees." Transcript at 138-39. According to the government's proffer, Ms. Hsia took the affirmative steps of soliciting conduit contributions and putting conduit checks in the mail or handing them to a representative of the political committee, and she thereby "put into motion a series of events which ultimately led to the false statements being submitted to the FEC." Id. at 138.[31]

The problems with the government's theory abound. First, the checks themselves do not make any assertions as to whether the person who signed the check was the true source of the contribution, and since a check is not an affirmative statement of anything, it cannot make any affirmative misrepresentations. Williams v. United States, 458 U.S. 279, 284 (1982) (signature on check implies only factual assertion that drawer will make good on obligation if bank refuses to honor check; signature is not factual assertion at all and does not even imply that sufficient funds are in account to cover check); United States v. Elliot, 689 F.2d 178, 180-81 (10th Cir. 1982) (same; conviction reversed and remanded with instructions to dismiss indictment). Furthermore, since a contributor has no obligation to disclose any identifying

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[31] The government's strongest case is set forth in the bill of particulars. Even that "best case" presents only a very weak argument that Ms. Hsia engaged in any willful conduct that caused the political committees to make false statements to the FEC: Ms. Hsia allegedly solicited and collected money from various individuals and provided the money she solicited to other individuals ("straw" or "conduit" donors) who signed checks in particular amounts, leaving the payee line blank; Ms. Hsia or someone else at her direction then wrote in the name of the political committee and forwarded the checks to the committee. Bill of Particulars at 14-15. The bill of particulars adds the fillip that she did so "knowing that the committee would report the contributions to the FEC as having been made by the conduits," id., a statement that relates only to her knowledge and adds nothing to the *conduct* the government intends to prove at trial.

information to the political committee or to the FEC and may simply not respond when the political committee meets its minimal statutory obligation of asking for such information, Republican Nat'l Comm. v. Federal Election Comm'n, 76 F.3d at 406, the signature on the check is not an indication of anything more than that the signatory signed the check; it says nothing about whose money is being conveyed by the check that is presented. Cf. Brontson v. United States, 409 U.S. 352, 357-58 (1973) (unresponsive statement, even if intended to deceive, insufficient to sustain conviction of perjury). Absent some additional affirmative conduct, Ms. Hsia's solicitation and delivery or mailing of checks could not have "caused" the political committees to make false statements.[32]

While the government may have an argument that Ms. Hsia's actions were a "but for" cause of the alleged false statements, there comes a point when the causal links are so attenuated that a "but for" causal connection is not enough under the Due Process Clause to hold someone criminally responsible for a particular outcome. In a case with no First Amendment implications, perhaps the meaning of Section 2(b) causation could be stretched to cover the kind of

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[32] The knowing and willful intent requirement presents an additional obstacle for the government in this case. This Court previously has held that the prosecution must prove that Ms. Hsia "knew of the [political party] treasurers' reporting obligation, that [she] attempted to frustrate those obligations, and that [she] knew [her] conduct was unlawful." Opinion of August 13, 1998 at 5 (internal citations and quotations omitted). It is difficult, if not impossible, in the context of this indictment to imagine how the government possibly could prove that Ms. Hsia knew, at the time that she took whatever acts exposed her to Sections 1001 and 2(b) liability, that under the complex reporting scheme imposed on political committees, the listing of a name from a check might be deemed a "false statement" and that her solicitations might "cause" the political committees to make those false statements.

conduct alleged as the government proposes. Given the pervasive First Amendment ramifications at stake here, however, Section 2(b) cannot be so distorted.[33]

All of this is not to say that the government may not criminally prosecute the conduct alleged in the indictment under a narrowly drawn statute. But when general criminal statutes are used in an attempt to impose criminal liability in an area that is both First Amendment-sensitive and highly technical and complex, the Court must guard against the risk that legitimate and protected speech will be chilled, that a prosecutorial net, thrown broadly, will ensnare the innocent for unknowing or technical violations and will engender fear among those seeking to engage in legitimate protected First Amendment activity. See Buckley v. Valeo, 424 U.S. at 76-77; Cantwell v. Connecticut, 310 U.S. at 308.[34]

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[33] Count 6 of the Indictment is the only count that alleges that Ms. Hsia herself acted as a conduit contributor and that she signed and submitted a check to the political committee. This allegation, not present in Counts 2-5, strengthens the government's argument that there is a causal connection between Ms. Hsia and the political committee with respect to the conduct alleged in this count. The Court nonetheless concludes that it would still require a significant broadening of Section 2(b) to cover this conduct because the check that Ms. Hsia signed still makes no affirmative statement that she is the true contributor. Moreover, the fact that Ms. Hsia is one step closer to the statement made by the political committee does not alter the fact that it is nearly impossible to find that the reports imply any "false" assertions.

[34] The first count of the indictment, which charges conspiracy to defraud the FEC and the INS, is an example of a legitimate use of a provision of the general Federal Criminal Code to charge a violation in a First Amendment-sensitive area. The indictment clearly alleges a conspiratorial agreement, and it clearly alleges that the objects of the agreement were to obstruct specific functions of the FEC and the INS. See supra at 37-39. Thus, while the conduct charged in the indictment touches on areas of First Amendment sensitivity, the

The Court is not unmindful that even in areas of First Amendment concern, the expansive constitutional guarantees of fair notice, required both of the indictment and of the criminal statute at issue, and the constitutional protection against overly broad constructions of statutes are neither often nor lightly used by the courts to dismiss an indictment or reverse a conviction. Often these doctrines provide "little more than atmospherics," and the courts "do not tolerate judicial rewriting of otherwise validly enacted criminal statutes." See United States v. Nofziger, 878 F.2d at 456 (Edwards, J. dissenting). These doctrines gain true significance and substance, however, in those rare cases when an indictment so distorts a criminal statute that the words of the statute lose all meaning. It simply is not true that when the government uses a word, that word means what the government chooses it to mean. When faced with such an indictment, a court has the obligation to restore some boundaries to the words of the statute.

The remoteness of Ms. Hsia's position in relation to the FEC, the case law with respect to "literal truth," the fact that a check is not a statement, and the willful intent hurdle discussed in a previous opinion in this case together make it impossible to conclude that Sections 1001 and 2(b) can be applied consistently with the Constitution to the conduct alleged here. Any finding that Sections 1001 and 2(b) proscribe the conduct alleged in Counts 2-6 would require an unconstitutionally overly broad and vague reading and application of those statutes.

Court finds that the straightforward application of Section 371 to this conduct does not require an unconstitutionally overbroad construction of the statute.

The Court therefore concludes that they do not reach the conduct alleged in this indictment and that Counts 2-6 must be dismissed. The Constitution requires no less.

An Order consistent with this Opinion will be issued this same day.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 9/10/98

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
(Dated and Filed September 10, 1998)

UNITED STATES OF AMERICA,	)	
v.	)	Criminal No. 98-0057 (PLF)
MARIA HSIA,	)	
Defendant.	)	

ORDER

For the reasons stated in the Opinion issued this same day, it is hereby

ORDERED that Counts 2-6 of the indictment are DISMISSED; it is

FURTHER ORDERED that defendant's Motion No. 2 (to Dismiss Counts in the Indictment for Their Positive Repugnance to the Federal Election Campaign Act) is DENIED; it is

FURTHER ORDERED that defendant's Motion No. 3 (to Dismiss Count 1 of the Indictment for Failure to State an Offense) is DENIED; it is

FURTHER ORDERED that defendant's Motion No. 9 (to Dismiss Indictment Because it Offends the First Amendment) is DENIED; and it is

FURTHER ORDERED that defendant's Motion No. 10 (to Dismiss Indictment Because It Selectively Prosecutes Maria Hsia) is DENIED.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE: 9/10/98

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	Docket No. CR 98-57
vs.	Washington, D.C.
	February 29, 2000
MARIA HSIA,	9:45 a.m.
Defendant.	

VOLUME XIV
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

For the Government: ERIC L. YAFFE, ESQUIRE
JOHN M. McENANY, ESQUIRE
Campaign Finance Task Force

For the Defendant: NANCY LUQUE, ESQUIRE
RANGELEY WALLACE, ESQUIRE
ANDREW L. HURST, ESQUIRE

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Now the instructions I have just given you were intended to tell you what your job is and to tell you a little about the tools you use in doing your job, what the evidence is, what the burden of proof is and so on.

Now I am going to give you instructions about the specific charges in the case, and then at the end, we'll give you some general housekeeping instructions.

You will have a copy of the indictment with you in the jury room, so I am just going to summarize it now. I am not going to read it, and I have already told you that the indictment is not evidence in the case. It's just a formal charging document.

The indictment contains five counts. Each count charges that the defendant, Maria Hsia, violated the laws against causing material false statements to be made to an agency of the United States.

In particular, each count charges the defendant with knowingly and willfully causing a specified political committee, political party committee, through its committee treasurer to submit to the Federal Election Commission, an agency of the United States, material false statements, namely reports, that listed certain individuals as contributors to the political committee when as specified in Counts 1 and 2 the defendant knew that the individuals named in the report were not the

actual contributors; and as specified in Counts 3, 4 and 5 the defendant knew that the contributions had been made by the International Buddhist Progress Society or IBPS, doing business as the Hsi Lai Temple.

Count 1 of the indictment references a September 1995 fundraising event at the Century Plaza Hotel in Los Angeles, and it charges that the defendant knowingly and willfully caused the Clinton/Gore '96 Primary Committee to submit a report to the Federal Election Commission in July 1995 that contained material false statements, namely the identification of certain individuals as contributors to Clinton/Gore '96 when the defendant knew that those individuals were not the actual contributors.

Count 2 references the same fundraising event at the Century Plaza Hotel, and it charges the defendant with knowingly and willfully causing the Clinton/Gore '96 Primary Committee to submit a report to the FEC in October of 1995 that contained material false statements, namely the identification of certain individuals as contributors to Clinton/Gore '96 when the defendant knew that those individuals were not the actual contributors.

Count 3 references a February 1996 event at the Hay-Adams Hotel in Washington, D.C. It charges that the defendant knowingly and willingly caused the Democratic National Committee or the DNC to submit a report to the

FEC in April 1996 that contained material false statements, namely the identification of certain individuals as contributors to the DNC when the defendant knew that the contributions had been made by the International Buddhist Progress Society or IBPS doing business as the Hsi Lai Temple.

Count 4 references an April 1996 event at the Hsi Lai Temple. It charges that the defendant knowingly and willfully caused the DNC to submit a report to the FEC in July 1996 that contained material false statements, namely the identification of certain individuals as contributors to the DNC when the defendant knew that the contributions has been made by IBPS.

And finally, Count 5 references an October 1996 event at the Hsi Lai Temple. It charges that the defendant knowingly and willfully caused the Friends of Patrick J. Kennedy '96 to submit a report to the FEC in October 1995 that contained material false statements, namely the identification of certain individuals as contributors to the Patrick Kennedy Committee when the defendant knew that the contributions had been made by IBPS.

You have heard testimony in this case about certain definitions and contribution limits and prohibitions under the Federal Election Campaign Act or

FECA. To understand the charges against the defendant, it is necessary for you to understand certain concepts of the Federal Election laws under FECA.

In particular, you should know the following: FECA requires that political committees file periodic reports containing among things the identification of each person who makes a contribution to the reporting committee during the reporting period whose contribution or contributions have an aggregate amount or value in excess of $200 dollars within the calendar year together with date and amount of any such contribution.

A contribution under FECA is defined in part as any gift, subscription, loan, advance or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office.

FECA also provides that for purposes of the limitations on contributions and expenditures imposed by the Act all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.

FECA states that no person shall make a contribution in the name of another person or knowingly

permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

The courts have interpreted these provisions of FECA to require political committees to report the true source of contributions.

In addition, you should know the following about the Federal Election Campaign Act: Under FECA, no person may make contributions to any candidate or his or her authorized political committees with respect for any-- with respect to any election for federal office which in the aggregate exceed $1,000 dollars.

No person may make contributions to a political committee established and maintained by a national political party which is not the authorized political party of any candidate in any calendar year which in the aggregate exceed $20,000 dollars; and no person may make contributions to any other political committee in any calendar year which in the aggregate exceed $5,000 dollars.

FECA prohibits any corporation from making contributions in connection with an election to any political office or in connection with any primary election, convention or caucus held to select candidates for any political office.

FECA prohibits a foreign national, directly or through any other person, from making any contribution of money in connection with an election to any political Office or in connection with any primary election, convention or caucus held to select candidates for any political office.

FECA also prohibits any person from soliciting, accepting or receiving any such contribution from a foreign national.

Now you have heard testimony in this case regarding conduct which if proved could constitute a violation of certain of these limits and prohibitions under the Federal Election Campaign Act. I remind you once again, however, that Ms. Hsia has not been charged with any violation of the Federal Election laws.

The evidence that has been introduced concerning such conduct and concerning the requirements and prohibitions if these statutes may be used by you only to the extent you find the evidence helpful in determining whether or not Ms. Hsia knowingly and willfully caused false statements to be made in reports filed by political committee treasurers with the Federal Election Commission.

The only charges contained in the indictment are charges of knowingly and willfully causing false statements to be made, not violation of Federal Election

laws.

Now that I have described this background information to you regarding relevant aspects of the Federal Election Laws, I will describe to you the elements of the crimes with which Ms. Hsia has been charged.

Causing false statements is a violation of Title 18 United States Code Section 1001 and Title 18 United States Code Section 2B. Section 1001 makes it an offense for anyone in any matter within the jurisdiction of the executive branch of the Government of the United States knowingly and willfully:

One, to falsify, conceal or cover up by any trick, scheme or device a material fact;

Two, to make any materially false, fictitious or fraudulent statement or representation;

Or three, to make or use any false writing or document knowing the same to contain any materially false, fictitious or fraudulent statement or entry.

It is the only second of these with which Ms. Hsia has been charged. She is not charged with concealment or cover up or using false writing or document. She is charged with making a materially false statement.

Section 2B provides whoever willfully causes an act to be done which if directly performed by him or

another would be an offense against the United States is punishable as a principal. So she's charged with causing false statements to be made.

Specifically, in each of the five counts, the defendant is charged with the crime of knowingly and willfully causing the making of material false statements or representations to a government agency in a matter within the jurisdiction of that agency.

In order to sustain its burden of proof to show that the defendant knowingly and willfully caused the treasurers of the political committees to make false statements or representations in the FEC reports, the Government must prove the following five elements beyond a reasonable doubt as to each count:

One, on or about the date specified, a political committee treasurer made a false statement or representation to the Federal Election Commission;

Two, the defendant knew that the statement or representation was false;

Three, that the defendant willfully caused the false statement or representation to be made;

Four, that the statement or representation was a matter within the jurisdiction of an agency of the executive branch of the Government of the United States;

And five, that the statement or representation

was material.

One, on or about the date specified, a political committee treasurer made a false statement or representation to the FEC;

Two, that the defendant knew that the statement or representation was false;

Three, that the defendant willfully caused the false statement or representation to be made;

Four, that the statement or representation was a matter within the jurisdiction of an agency of the executive branch of the Government of the United States;

And five, that the statement or representation was material.

A statement is false if it was untrue when made and known at the time to be untrue either by the person making it or the person causing it to be made.

An act is done knowingly if it is done purposefully and voluntarily as opposed to mistakenly or accidentally. An act is done willfully if it is done with an intention to do something the law forbids with a bad purpose, to disobey the law, or with deliberate disregard for the law.

The first two elements are that a political committee treasurer must have made a false statement or representation to the FEC and that the defendant must have

known that the statement or representation was false.

The Government is not required in this regard to prove that the defendant knew of the specific reporting requirements or prohibitions of the FEC or that she knew whether conduit contributions were specifically prohibited. But the Government must prove beyond a reasonable doubt that she knowingly and willfully caused false statement to be made.

A third statement is that the defendant willfully caused the false statement or representation to be made. A person is responsible for an act which she willfully causes another person to do if the act would be criminal if it had been performed by her directly.

To willfully cause an act to be done means to intentionally bring it about. The defendant may be found guilty of causing a material false statement to be made only if you find that the Government has proven beyond a reasonable doubt all of the other elements of the offense as I have described them to you and that the defendant willfully caused another person or entity to actually make the false statement in question.

The fourth element is that the statement or representation was a matter within the jurisdiction of an agency of the executive branch of the Government of the United States, in this case the Federal Election

Commission.

In order to find that a statement was made within the jurisdiction of the FEC, it is not necessary for the Government to prove that the defendant actually knew that a false statement or representation was to be made to the FEC or was utilized in a manner which was within the jurisdiction of the Federal Election Commission.

It is sufficient to satisfy this element if you find that a false statement was made with regard to a matter that was in fact within the jurisdiction of the FEC.

As far as agency of the United State is concerned, I instruct you that the Federal Election Commission is an agency of the executive branch of the Government of the United States. So that's not an issue.

Finally, the fifth element is that the statement or representation must have been material. A statement or representation is material to an agency of the federal government if the statement or representation has a natural tendency to influence or is capable of influencing a decision or action of the agency, in this case the FEC.

For the statement or representation to be material, it is not necessary for the Government to prove that the government agency was in fact misled as a result of the defendant's actions or even that it knew of the

misleading or deceptive acts. But in determining whether a statement was material, you should consider what statement was made and what decision or action the agency was trying to take.

Each count of the indictment charges that the particular offense took place "in the District of Columbia and elsewhere". In general, a criminal prosecution may be brought in any district in which such offense was begun, continued or completed.

Where the crime charged is causing false statements to be made in a matter within the jurisdiction of an agency of the Government of the United States, the crime may be prosecuted, among other places, in the district where the document containing the alleged false statement was filed with the federal agency.

So in this case before you may find that the defendant is guilty, you must find as to each particular count that you are considering that the report in question containing the alleged false statement was in fact filed with the Federal Election Commission in the District of Columbia.

Now there's been a lot of talk about intent, willfulness, knowledge. Someone's intent or knowledge ordinarily cannot be proven directly because there's no way of looking directly into the workings of the human

mind. But you've dealt with a lot of people in your lives, and you've made judgements about what people were intending, what they might have known.

So you may infer the defendant's intent or her knowledge from the surrounding circumstances. You may consider any statements made or acts done by Ms. Hsia and all the other facts and circumstances received in evidence which indicate Ms. Hsia's knowledge or intent.

You may infer but are not require to infer that a person intends the natural and probable consequences of her acts. It is entirely up to you, however, to decide what to find from the evidence that has been received during the course of the trial.

You should consider all the circumstances and evidence in determining whether the Government has proved beyond a reasonable doubt and that Ms. Hsia acted with the necessary state of mind.

In addition to evidence relating directly to the political contributions charged in the five counts of the indictment, you also heard evidence concerning certain other alleged contributions in this case.

Namely, you heard evidence about two contributions that the Government assert the defendant made and that IBPS or the Temple allegedly reimbursed, one to the campaign of march Fong Eu for California Secretary

of State, and one to the campaign of Don Knabe for Los Angeles count supervisor. It is up to you to decide whether to accept that evidence. The evidence relates only to Counts 3 and 4.

If you find that the defendant made the contributions to the campaigns of March Fong Eu and/or Don Knabe and that IBPS reimbursed the defendant for those contributions, you may consider that evidence only for the limited purpose of deciding whether the Government has proven that the defendant knew of IBPS' alleged practice of reimbursing other people for contributions; and therefore, whether it is fair to infer that Ms. Hisa also knew that IBPS reimbursed individuals for the contributions described in Counts 3 and 4.

You may not consider this evidence for any other purpose. The defendant has not been charged with any offense relating to either of these two asserted contributions.

You may not consider this evidence to conclude that the defendant has a bad character or that she has a criminal personality. The law does not allow you to convict someone simply because you believe she may have done things not specifically charged as crimes in this case. The defendant is on trial for the crimes charged and only for the crimes charged.

You may use this evidence of acts not charged only for the limited purpose of helping you to decide whether the Government has proven all of the elements of Counts 3 and 4 beyond a reasonable doubt:

During the trial, evidence was also introduced relating to the alleged alteration of the documents by a person or persons unknown. There is no allegation whatsoever that Ms. Hsia was involved or even aware of the alteration of any document.

You are instructed that you may consider these alleged alterations by others only for the limited purpose of determining whether any statement allegedly made in the FEC reports were in fact false. You may not consider these allegations for any other purpose.

You have also heard testimony and seen evidence about numerous checks that are not alleged to be improper. Ms. Hsia is only charged with knowingly and willfully causing false statements in FEC reports as to the checks that are specifically listed in the indictment.

In particular, you heard testimony about Government Exhibits 11B-3 through 11B-7. These checks are not charged in the indictment. These checks were introduced solely as part of the circumstances relating to the transaction Mr. Yeh testified about.

You also heard testimony about 11C-1. It too was

introduced for a limited purpose, that is as part of the circumstances relating to the transactions testified to by Mr. Zhou.

Now in their closing arguments, I think—but it's your recollection that controls—that both lawyers talked about the First Amendment to the Constitution. The First Amendment to the United States Constitution protects an individual's right to solicit and/or make contributions to political candidates and political parties. The First Amendment does not protect the knowing and willful causing of false statements to a government agency.

The defense contends that no false statements were made to the FEC. The defense contends that the FEC report forms do not request any information about whether or not a contribution was reimbursed and that political committee treasurers do not in fact include such information in their reports to the FEC.

The defense contends that the political committee treasurers do not ask their contributors about reimbursements or even whether the contributors whose checks have been received are the true sources of funds.

The defense also contends that political committee treasurers in their solicitations in donor cards do not tell contributors that the political committees need such information for any purpose.

The defense also contends that even if false statements were made, which the defense denies, Ms. Hsia had no knowledge of such false statements and was not responsible for causing such false statements to be made.

The defense also contends that Ms. Hsia did not know that anyone was reimbursed for any contribution, specifically with regard to Count 5, the defense contends that the payment Ms. Hsia received from the His Lai Temple after making her contribution to the Patrick Kennedy Committee was money the Temple owed her and was not money she considered to be reimbursement.

In all, Ms. Hsia's political activities, both those alleged in the indictment and those about which you have heard testimony, the defense contends that she was exercising her First Amendment rights to participate in political activity and to solicit and make political contributions.

When you return to the jury room, you should first select one of your members to be the foreperson. The foreperson's job is to preside over deliberations and to be your spokesperson here in court, but every juror is equal in the jury room.

You will receive in the jury room all of the exhibits that have been admitted in evidence with you, and I believe the lawyers and Ms. Montgomery have sorted all

APPENDIX E

TRANSCRIPT OF PROCEEDINGS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v. No. 01-3013

MARIA HSIA,

Appellant.

Pages 1 through 52

Washington, D.C.
November 14, 2001

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, Appellee, v. MARIA HSIA, Appellant.	No. 01-3013

Wednesday
November 14, 2001
Washington, D.C.

The above-entitled matter came on for oral argument, pursuant to notice

BEFORE:

THE HONORABLE HARRY T. EDWARDS, Chief Judge

THE HONORABLE JUDITH W. ROGERS, Judge

THE HONORABLE STEPHEN F. WILLIAMS, Judge

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PROCEEDINGS

THE CLERK: Case No. 01-3013
UNITED STATES OF AMERICA, Appellee
v.
MARIA HSIA, Appellant

Ms. Luque for Appellant and Mr. McEnany for Appellee.

THE COURT: Before we start, I just want the record to indicate that my colleagues, Judge Rogers and Judge Williams, were members of the Special Panel of the Judicial Council of this Circuit that filed a report with the Council regarding complaints filed against then Chief Judge Johnson and other District Court Judges including Judge Friedman who was a Trial Judge in this case.

The Judicial Council found no merit to the complaints and on October 10, 2001 in connection with the complaint filed against the Chief Judge, the United States Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders issued a public opinion stating that it saw no reason to distrub the conclusions of the Judicial Council. The investigation conducted by counsel for the Special Committee was extensive and thorough. As did the Judicial Council, we find the conclusion of that

investigation persuasive. We affirm the Judicial Council's dismissal of the Complainant's complaint for the reasons stated by the Judicial Council in its February 26, 2001 memorandum and order, end of quote.

The U.S. Judicial Conference Committee also concluded that no reasonable observer would perceive an improper partisan bias for the Judge's actions.

Okay, we may proceed.

ORAL ARGUMENT OF NANCY LUQUE, ESQ.

ON BEHALF OF APPELLANT MARIA HSIA

Good morning, Your Honors, my name is Nancy Luque. With me at counsel table is Donna Sheinbeck (sic) and together we represent Maria Hsia. And good morning, counsel.

Your Honors, we have, as you know, addressed many issues in the brief on appeal, but I would like to focus this morning on what I believe are the central theme of the appeal and the most important reasons why this case needs to be reversed.

The Government simply did not prove, did not prove that Maria Hsia knowingly caused false statements. The Court and the Government, I believe, misconstrued this Court's prior holding in the prior case of United States versus Hsia, which I'll refer to

as Hsia I. And it invaded, that is, their misconstruction of that case, invaded every aspect of this trial from the proof to the Jury instructions. During the course of the motion, the Rule 29 motion, where I repeatedly argued that the Government had not proved false statements, as in their brief, as in the Government's brief, the Government alludes constantly to the Court's holding in Hsia I.

As I understand the Court's holding in Hsia I, the Court was examining the sufficiency of the then indictment against Maria Hsia, an indictment that included a conspiracy count and charged Ms. Hsia with concealing from the FEC pertinent facts. That is not the indictment that went to trial, but in any event, Hsia's holding, I believe, was limited to whether or not the indictments sufficiently stated a cause of action such that it could go to trial.

The Government, however, used some of the Court's language in Hsia I, that is, the Court's belief that the true source of contributions were required by FED (sic) regulations to be reported, to substitute for facts. They argued to the court and they asked for Jury instructions that suggested to that Jury that because the FEC required true source reporting that was enough to convert a conduit

contribution into a false statement. There was no evidence that any statement was –

THE COURT: Let's go down on that. Convert, convert conduit contribution into a false statement. What is the conversion you speak of?

MS. LUQUE: Your Honor may recall that you wrote in Hsia I that a conduit contribution was enough to possibly cause a false statement. You said the statement apparently could be false because the reporting requirement was that when the committee, the political committee reported to the FEC, they were supposed to be reporting contributions and the true sources of those contributions. That's what the Court held.

The Government argued, and the Court believed, and instructed the Jury that because the true source of political contributions had to be reported and in this case wasn't, that rendered the statements false.

THE COURT: And that's wrong because?

MS. LUQUE: That's wrong because, Your Honor, first of all, I would point you to the Government's evidence in this case on the issue of whether there was a statement. They entered the reports, five political committee reports into

evidence. Those reports contain no statements, so I would allude to the Gatewood line of cases which suggest –

THE COURT: That had a list, right?

MS. LUQUE: It has a list that's entitled "receipts."

THE COURT: Right. And then it had the sources, the reported sources of the receipts, no?

MS. LUQUE: No, Your Honor. It's in the Joint Appendix, I believe at 237, you can see the report.

So that the report in and of itself talks about how much money is received and attaches a schedule which lists receipts. And the receipts are from the people who wrote the checks.

THE COURT: So –

MS. LUQUE: Bear with me for one minute though.

THE COURT: Right.

MS. LUQUE: So on it's face I would submit to the Court the report does not state anything. You would have to –

THE COURT: I'm sorry. I'm looking at page 241, Schedule AP, ENC Yeats, employer, occupation, date, amount.

MS. LUQUE: But it's entitled "itemized receipts." It's not entitled contributions. There's nothing in the report –

THE COURT: What does the name mean?

MS. LUQUE: Well, that's the question, Your Honor. That is the precise question here. The point I'm making to you is without more –

THE COURT: Your argument is essentially that the FEC is collecting totally meaningless data?

MS. LUQUE: No.

THE COURT: Volumes of it?

MS. LUQUE: My argument is, your Honor, without more, that is without going beyond the report itself, it makes no statement. You need more than just the statement itself. So what did the –

THE COURT: Well, if we know what the reports are designed to do, why do you need more?

MS. LUQUE: Because the report has to do it. It isn't just that the regulations require statements. Statements need to be made in a false statements case, Your Honor.

THE COURT: But the language is read in context.

MS. LUQUE: Your Honor –

THE COURT: Right? And as far as I can

make out, you strip away all context and make it just gibberish.

MS. LUQUE: No, Your Honor, because I'm going to the next point which is context. The first point is just that the report, on its face, makes no statement. None whatsoever. That does not mean Your Honor was wrong in saying that it requires –

THE COURT: Where is it in the report that – I mean the sort of initial pages of the report that schedule A-P – schedule or schedules – A-P, is or are identified?

MS. LUQUE: Your Honor, I'm not sure that it's in here. This is the exhibit that was received into evidence, Your Honor.

If you look at the beginning at 237, that's the first page of the report.

THE COURT: Yes.

MS. LUQUE: But I'm not sure I see anything that describes the schedule in any more detail.

But if I may just be moved to the next point because I want to answer your question.

THE COURT: What is it you think "receipts" means?

MS. LUQUE: Your Honor, that's the point

though. This is not a statement without more. There has to be more evidence than just this bare document. So to that end, the Government called the head of Enforcement from the FEC because on its face this piece of paper makes no statement.

THE COURT: Yes, but you see on 238 where it says "receipts" and then it says "federal funds itemized on Schedule A-P" and then it has all the other listings, where do those numbers come from?

MS. LUQUE: I assume, Your Honor, from the schedule that's attached.

THE COURT: And that's A-P itemized receipts, right?

MS. LUQUE: Right.

THE COURT: But that's' referring to contributions other than loans.

MS. LUQUE: Right

THE COURT: So back to Judge Williams' point, reading this in context, why isn't the receipts a statement of contributions?

MS. LUQUE: It is – do believe it's a proper inference that this is a statement of contributions. That, I believe. What I don't believe is that this is a statement of true source of contributions. And the reason –

THE COURT: Let's look at line 17 here on page 238. Contributions, other than loans, from – subcategory A. Individuals. Persons other than political committees.

MS. LUQUE: All of these things are listed in this report.

THE COURT: Right. Do you say that the people requiring this report have no interest in where the money comes from?

MS. LUQUE: No, I'm not saying that, Your Honor. I am talking about the literal piece of paper and only the piece of paper and I'm leading to the next point which is that Government needed to call a witness who would say, I believe, that –

THE COURT: I don't know if the government needed to call a witness. You're telling me that.

MS. LUQUE: I'm telling you that –

THE COURT: The fact that the Government called a witness doesn't tell us anything about whether it needed to.

MS. LUQUE: What I'm saying, Your Honor, is that this paper makes no statement about true source of contribution. It just doesn't make that statement and I know that because every witness the Government called said that. The head of Enforcement

from the FEC was asked whether these names listed told her that this money came from these people, whether this reported to her true source, whether she could tell from this report whether these people were the true sources of the money –

THE COURT: Which could have been people who were cheating.

MS. LUQUE: No, no, no. She said could you tell from the report whether or not – whether or not – does this report make a statement whether or not true source.

THE COURT: No, it's a statement about purported source. I mean we don't know whether it's true or not, that's the whole point.

MS. LUQUE: Exactly. That's exactly right.

THE COURT: That's not helpful to you. If you know you're required to submit information on the source, that it is in fact not true isn't helpful to you.

MS. LUQUE: But Your Honor, every political committee said they didn't have to give information on source. Everyone who testified as we cited in the brief and as in the transcript. Every single political committee person who testified said

we don't' have to report true source. They misperceived the regulation, Your Honor. I don't know what the FEC has done in light of Hsia I.

THE COURT: It sounds like legal opinions. I'm not sure what it means.

MS. LUQUE: No, it wasn't legal opinions. It was factually speaking, are you reporting –

THE COURT: No, but in other words, they were entitled under this sort of best efforts argument, that the check they received was, in fact, from the person who had contributed the money?

MS. LUQUE: Right.

THE COURT: Absent some evidence they received to the contrary.

MS. LUQUE: That's right.

THE COURT: That doesn't help you again. That's like saying the victim of a fraud, for there to be a fraud the victim doesn't have to know that he's being defrauded, yes.

MS. LUQUE: That isn't what I'm saying. What I'm saying is in a false statement case there has to be a false statement. Somebody has to know that they're making a statement. The committees needed to know they were making that statement. The FEC needed to know they were making a statement and

most importantly –
THE COURT: When you write something down in a column that's labeled and asks for certain kinds of information, you know you're giving something, right?
MS. LUQUE: Well –
THE COURT: You know it's either true or false, what you're saying. You're giving information.
MS. LUQUE: You're never asked. No one has ever asked it.
THE COURT: There is a column or whatever it is, I don't have it in front of me, there's a line to which a response is given.
MS. LUQUE: But only the response, Your Honor, is only to name, address, occupation. It's not where did you get the money? For example –
THE COURT: The whole thing is set up for that to be more or less random.
MS. LUQUE: Your Honor, I do not defend this regulatory scheme. I want to make sure of that. I do not defend it. But, it is imperfect. There is a reason –
THE COURT: You're saying it's totally meaningless.
MS. LUQUE: Well, that's essentially what

Lois Lerner said. She said you can't tell. We don't expect people to find out.

THE COURT: But when you can't tell something – the part of your argument that's perplexing to me, if it's true that everyone in the world who fills out this form has no idea what they're doing, it seems to me some – it would occur to someone to ask. I would never put down information where I knew there were potential penalties, just randomly without any idea what I was doing – that argument makes no sense to me whatsoever. There is a label. There is something that says put certain kind of information down. And you respond to that.

MS. LUQUE: For example, you are writing a check on your joint account with your wife for a political contribution. Whose money is that? All you're asked to say is your name, your occupation and this is your check. You're not asked to tell the committee that –

THE COURT: If you have a joint checking account, there are all kinds of interesting ambiguities, but those aren't what we have here. You don't have someone making a mistaken resolution of an ambiguity. We have what in (sic) ordinary called fraud.

MS. LUQUE: The reason what we have here

is exactly that is because of the layers you have to go to to get to this statement. Remember, the check writers in this particular case, did not even talk to Ms. Hsia. They're writing a check.

In some cases they're being asked their occupation and address and in some cases not. The DNC didn't contact any of these contributors. They simply wrote down what was on the check without donor cards, without any information. So you've got several layers going to this statement, but the point is the Government proffers this as the false statement.

THE COURT: Well, that's what we said in Hsia I, that this is –

MS. LUQUE: Could be –

THE COURT: A source of contribution.

MS. LUQUE: What you said in Hsia I was this could be a false statement, but that is a fact for the Jury.

THE COURT: We didn't have evidence before us.

MS. LUQUE: Exactly.

THE COURT: Of course we had to –

MS. LUQUE: When the evidence goes before the Jury there's no evidence of a statement and there's no evidence that Maria Hsia, in fact, the

Court told the Jury that they didn't have to find that Maria Hsia even knew there was a reporting – that the report was going to be made.

THE COURT: Wait, wait, wait. Now you said two or three different things. What are you claiming that the Court told?

MS. LUQUE: I'm claiming that the Jury instructions were that the Government did not have to prove that Maria Hsia was aware that there was a reporting requirement to the FEC. Maria Hsia is six steps removed from this report, six steps removed. She's talking to people. They're making contributions through conduits. Those conduits aren't talking to Maria Hsia. They're talking to the fund raisers (sic). The fundraisers are taking the donor cards and the reports are being filled out. So she's way over here.

The report, this report –

THE COURT: Way over here devising conduit systems.

MS. LUQUE: Absolutely not. the evidence did not show that, Your Honor. The evidence showed in counts 1 and 2, that she had conversations in Chinese with Chinese speaking individuals about how they couldn't be – they had to be at least green card people to contribute. There's no evidence that she

devised a scheme. That was the allegation –
THE COURT: Well, that does raise an interesting question and that is her motivation which I have to say I find somewhat baffling. What's in it for her?
MS. LUQUE: Your Honor, that is exactly the point. When you looked at the indictment the first time, this Court looked at the indictment the first time, you looked at an indictment that accused her of conduit contribution schemes, motivations, using a Buddhist temple. That count was stricken because the Government dismissed by the Government, they couldn't prove that. And they didn't prove that. Each of these counts is disparate. There's no scheme. In counts 1 and 2, there's an event. A fundraiser asks her to help. She has conversations in Chinese with two Chinese speaking people about the fact that you need to have 10 checks.
THE COURT: You're not really helping me because –
MS. LUQUE: There's nothing in it for her. She's not the fundraiser that they were paying her to be. They didn't prove that she was the fundraiser in any of these events. It was Peter Kelly in 1 and 2. It was John Wong in 3 and 4.

THE COURT: I thought though that there was testimony by Wong that he gave her credit.

MS. LUQUE: He gave her credit, but he didn't tell her he gave her credit. He gave her credit because he thought she deserved it for having helped organize the event, but the testimony, Your Honor, was she wasn't even in town during the organization of the event. He communicated directly with the temple about those contributions.

And while I'm on counts 3 and 4, there is no evidence, whatsoever in this record, that she caused those contributions in 3 or 4. There's barely evidence that she knew that they were conduit contributions. There is no evidence that she caused it.

Counts 3 and 4 are particularly slim on evidence. But I don't want to leave this reporting point without making clear –

THE COURT: Finish up.

MS. LUQUE: -- the Jury was told they didn't have to find that she knew the reporting requirements. I believe that happened because I believe Judge Friedman confused, once again, confused by the Hsia I opinion, although I don't know why. He confused the fact that this Court held that they

didn't have to find, they didn't have to prove specific intent. In other words, they didn't have to prove that she knew the reporting regulations and that that was illegal.

He confused that with whether or not she had to know the fact that a report would be made. In other words, that a statement would be made. There's no evidence anywhere in the record that she knew a statement was going to be made and he told the Jury that she didn't have to know a report was going to be made.

THE COURT: I'm sorry, just going back a moment. If I'm correct, looking at the Table of Contents in your brief, the only item relating to Jury instructions is Item D, which takes us to page 34, where there's one paragraph and you quote the District Court as saying "the Courts have interpreted these provisions to require political committees to report the true source of contributions."

MS. LUQUE: Yes, Your Honor, but in the – the Government in their response argue that they proved that Maria Hsia was aware of the reporting requirements. As a result of that argument –

THE COURT: Well, I mean the only Jury instruction argument you appear to raise in your brief

is this one, is that correct?
MS. LUQUE: No, that's wrong. There's a second –
THE COURT: Where is it? Because that's the same problem – that's why I'm hesitating. I'm trying to find the same thing. I don't know where you've raised this.
MS. LUQUE: Well, the point I just –
THE COURT: There's certainly information about whether, in fact, she had it and there are some facts about that, but that the instruction was infirm, I missed that in your brief.
THE COURT: Where is it? Just give us a page number?
THE COURT: I don't know where it is.
MS. LUQUE: I'm sorry. I thought it was in the constructive amendment argument. We made a constructive –
THE COURT: None of us can find it. It may be there, but I sure don't have it. I –
THE COURT: That's – yeah, Jury instruction. That's what I was reading to you.
MS. LUQUE: No, there's two separate Jury – there's a Jury instruction argument within the constructive amendment argument and then there's a

separate Jury instruction argument, but Your Honor, I may be citing to a Jury instruction that came up in our reply brief as a result –

THE COURT: That's under the laws of the Circuit, you've got a real problem if that's all you can cite to.

MS. LUQUE: Well, Your Honor, except that –

THE COURT: You're arguing that as the key part of your argument now. This is the principal argument you're advancing and you're saying you didn't raise it until the reply brief?

MS. LUQUE: No, the principal argument I'm advancing is they didn't prove that she knew about the reporting requirements because –

THE COURT: Well, that's a different one because you do have some evidence in the record on that, the facts and also the campaign guide.

MS. LUQUE: The campaign guide, Your Honor, if I may address that. I know I'm out of time –

THE COURT: What about the facts?

MS. LUQUE: The facts in the campaign guide, (a) that it was an improperly admitted document with no foundation, so –

THE COURT: It's both?
MS. LUQUE: The facts. It came in with no testimony. It came in through a stipulation as to authenticity, so it was improperly admitted in the first place, but in the second place –
THE COURT: What do you mean it came in as a stipulation to authenticity?
MS. LUQUE: I stipulated to the authenticity of the document. In other words, the document was found in the law offices of –
MS. LUQUE (sic): And why then was it improperly admitted?
MS. LUQUE: Because there was no foundation for it to get over the hearsay objection. While it was authentic, it was still inadmissible –
THE COURT: This was the checks issue?
MS. LUQUE: It's the same issue as the checks where there's a stipulation, I object –
THE COURT: There's (sic) seems to be some pretty good authority against you on that.
MS. LUQUE: On the checks?
THE COURT: Yeah, as not being hearsay, once they're authenticated.
MS. LUQUE: But this is a different matter, your Honor. There has to be a specific

foundation for a business record exception. It wasn't laid. There was no foundation. In fact, when the witness testified, Howard Hom, because the Court made me have him testify for my exhibits, he pretty much said in his testimony which we've provided in our supplemental appendix, that he had no idea what was in any of these files and he couldn't link them to Maria Hsia. And the Government didn't even try to link that document to Maria Hsia. But I'll say one more thing –

THE COURT: I'll give you a little time on rebuttal.

MS. LUQUE: The cover facts, Your Honor, says that Maria Hsia is sending that campaign guide because it gives the rules on PACs. There's no evidence that Maria Hsia ever read that campaign guide, ever knew about reporting requirements and in there, there's nothing about true source and I'm very sorry to have taken so much time.

May I have a few minutes for rebuttal?

THE COURT: We'll see when we get there.

ORAL ARGUMENT OF JOHN M. McENANY, ESQ.
ON BEHALF OF APPELLEE, THE UNITED STATES OF AMERICA

Good morning, Your Honors. May it please the Court, my name is John McEnany and I'm one of the

attorneys who represented the Government at the trial and other proceedings below.

We have honed down the arguments that we need to talk about here. The Defendant's principal argument, as I understand it, really does appear to be little more than a reargument of the literal truth issue in Hsia I, that because the FFC reports do not contain an explicit statement, I might almost call them magic words, to the effect that "the true source of all contributions must be reported" no rational Jury could have found that the FEC reports were intended to be a statement of the true source of contributions to a political committee. In other words, in no rational Jury could reach the same conclusion that this Court did, as a matter of law in Hsia I.

Well, that's just wrong. First of all, to the extent that the defense argues that the Government used Hsia I as its proof before the Jury, that's not correct. Hsia I, of course, the opinion was never before the Jury.

In this case, the Jury learned from witnesses and other evidence that the function of the FEC is to regulate who contributes how much to candidates and parties in federal elections and to

disclose to the American people who, in fact, contributed how much in those federal election campaigns.

THE COURT: Right. Let me just ask you, her argument as I understand it, is that may well be what the statute is designed to do, but the Agency in developing a report to implement the statute has imperfectly designed a report and what the report says to the treasurers of these political committees is list all the receipts and some of them, candidly, may accurately reflect the true source and others may not, but that's a determination for a later time. That all it said here is ever (sic) check you received, list it.

MR. McENANY: Your Honor, the issue as to whether the report actually carries out the intent of the law and the intent of the regulations, I think, was settled as a matter of law in Hsia I.

THE COURT: No, what I'm getting at is the testimony in this case that the people who were filing these reports understood them to be a list not of true source, but a list of receipts. I'm not arguing Hsia I all over again. I'm just arguing whether you showed what Hsia I said it was possible to show.

MR. McENANY: Your Honor, there is no one who testified that these reports are understood to be

nothing more than a check register –

THE COURT: How about that they weren't true source reports?

MR. McENANY: There was testimony that that particular language, that particular phraseology, this list constitutes a true source of contributions does not appear in the report and that, of course, is true. The meaning of that, I think – the absence of that was decided in Hsia I. That's not determinative of the issue.

Ms. Luque, in her oral argument, just indicated that it is a proper inference that the Jury could draw from the form itself that it was a statement of contributions and the –

THE COURT: No, but let me give you a hypothetical, if I were not a Judge.

MR. McENANY: I'm sorry?

THE COURT: Let me give you a hypothetical, if I were not a Judge. I want to make a political contribution. I have neither the cash on me and I've run out of checks, so I say to my friend, write this check to the political action committee and he does and I'm – he and I are perfectly willing to acknowledge that the money comes from me, because I'm going to reimburse him for it and you're just saying

that I can't do that legally under the statute. Isn't that your best argument?

MR. McENANY: No, Your Honor, the way that you could do that is by disclosing at the time the check is written who the source of the contribution is and that it's being given via a disclosed intermediary. If you don't have a checkbook –

THE COURT: You could just have it on the check, I take it. You have the payor write the check to the contributor, who then endorses it over to the committee. Or maybe that kind of check isn't allowed?

THE COURT: That's one way. Or the other way is he just writes a check, but it's clear I'm going to pay for the amount of the contribution and I thought your argument was going to be the statute says you can't do this type of conduit.

MR. McENANY: If you don't do what I say you have to do, then –

THE COURT: Which is what? What do you have to do?

MR. McENANY: Your Honor, if you run out of checks and you want to make a contribution and you get a friend to write a conduit check for you, then when you submit that check you need to disclose that the money is coming from you and that the donation is

being –

THE COURT: Disclose it where?

MR. McENANY: To whoever you pass the contribution on to, whether it's directly to the political committee –

THE COURT: Suppose I say to the treasurer of the committee, look, I've given $100, but the committee has already filed its report with the FEC that lists my friend having given this check.

MR. McENANY: Well, then you have –

THE COURT: What have I violated?

MR. McENANY: You have violated a provision not charged in this indictment of giving a contribution in the name of another. Your friend has done the same. And when you provide that information to the committee that by the way the check that came in last month, it was my money, the committee would have to disclose that in its next report.

THE COURT: I'm not arguing everything except the last line. I want to be very clear about the last line.

I'm not suggesting that your reading of the statute isn't correct, that I , as the actual contributor, have to disclose that I am the one who gave the money. The question is when the treasurer of

the political committee files the report, what is the treasurer filing?

There may be another report where the treasurer has to get or attach statements by me, for example, saying in fact, you know I am the actual true source of that $100 contribution. That's what I'm trying to understand here.

MR. McENANY: Yes, Your Honor. From the testimony in this case, if there is a correction to be made to information filed in a previous report, it is made in the next report.

THE COURT: Correction. But what I'm getting at is I think the argument is where does this report ask anything other than to list receipts? There may be another report that asks, list statements by any contributors that they are the actual source. It just isn't in this report is the argument, as I understand it.

So you had to supplement that – this is the argument. I just need to understand your response. Supplement that with the statement, presumably, by somebody at trial that the treasurer thought that they were representing and that they were required to file a report saying the contribution actually came from this person, not just the evidence

of the check.

MR. McENANY: We provide a context. We had the – as I started to summarize the testimony of chief of Enforcement at the FEC about what the FEC is for, what these disclosure forms do and they basically disclose contributions. people want to know who contributed, not who didn't contribute.

THE COURT: Well, but what Judge Rogers is saying they may or may not disclose contributions.

MR. McENANY: As a matter of law, they do disclose contributions. That's Hsia I.

THE COURT: They disclose purported contributions is what they disclose, right?

MR. McENANY: Well, they disclose the treasurer's best knowledge as to what the contributions are barring honest mistake or as in this case, fraud. And continuing with the context, we – the evidence included the testimony of persons associated with committees about exactly what they do do with checks where they notice an issue.

Some of the most telling evidence of Maria Hsia's own personal knowledge was an exchange that she had with Linda Retourneau (sic), and employee of the Democratic Senatorial Campaign Committee, where Maria Hsia tried to submit a check in the name of another

disclosed, on a fax, here's a check from so and so. Please list it under somebody else's name and back and forth where it came to faxes, and the telephone conversations, you can't do that. You've got to do the check in your own name and by the way, here's a copy of the regulations prohibiting th[illegible].

So –

THE COURT: I understand that hypothetical in the sense that everybody's on notice there, that you can't do this. I just want – you say the FEC Enforcement head said that there are forms. Is this the only form, this – what's the number of the form, FEC form 3P. Is this it (sic) only form that the political committee treasurer has to file?

MR. McENANY: Your Honor, those are the only forms pertinent to this case. I might note that there are different forms depending on whether you're a primary committee. I think there are three different forms in this case, but these were the only forms that were at issue in the case and when there was a discussion about what if you learn further information about a contribution, the testimony was that's disclosed in your next filing.

THE COURT: Let me go to the instructions question. The Jury instructions on a report of

inquiry, the Trial Judge said the government is not required in this regard to prove that the defendant knew of the specific reporting requirements or prohibitions of the FEC or that she knew whether conduit contributions were specifically prohibited. But the Government must prove beyond a reasonable doubt that she knowingly and willfully caused false statements to be made.

What the devil does that mean?

MR. McENANY: Your Honor, that is a charge consistent with this –

THE COURT: Why is the willful causation – your whole case rests on these reports. You have – the instruction has wilfully (sic) caused just kind of hanging out nowhere.

MR. McENANY: Well, in Hsia I, this Court rejected the specific intent standard of proof from the Third Circuit case of Curran. And the charge in this case accurately states what needs to be proven under the normal intent and knowledge requirements –

THE COURT: Hsia I didn't purport to disconnect proof from the evidence, the precise evidence that you were going to rely on.

MR. McENANY: No, I'm not arguing with that at all.

THE COURT: I don't understand how this instruction cuts muster at all? It opens you to the argument that she's making that this is so attenuated because you're saying, in effect, the instructions say she doesn't have to know anything about the form, the reporting requirements, conduit contributions, none of that. She doesn't have to know that they exist or that they're prohibited or anything.

MR. McENANY: Your Honor, it is a correct statement of the law, I would say under Hsia I which rejected Curran, that that level of specific knowledge need not be shown. That was the charge in Curran. But as far as – but the Government did not, in any way, disconnect Maria Hsia's knowledge of FEC reporting requirements from the proof of causation and particularly wilful (sic) causation in this case.

The evidence in this case was completely clear that Maria Hsia was fully familiar with FEC reporting procedures. I can review that for the Court, but I really don't think that's an issue in this case at all.

And so that the – as far as the actual causation is concerned, when you refer to attenuation, there's no attenuation at all. Maria Hsia gave checks –

THE COURT: What does this instruction mean?

MR. McENANY: The instruction –

THE COURT: The Government is not required to prove that the defendant knew of the specific reporting requirements or prohibitions of the FEC or that she knew whether conduit contributions were prohibited?

MR. McENANY: Your Honor, that's an accurate statement of the law in this Circuit from Hsia I which rejected the Curran Court's brining in of the specific intent and knowledge elements of –

THE COURT: I take it your analogy is to a taxpayer who brings a bunch of phony documents to his accountant with an intent to cheat on his income tax and these documents produce numbers in Schedule D and then the taxpayer signs the document prepared by the taxpayer (sic) without ever looking at Schedule D without being conscious that there is a Schedule D or that Schedule D, that there's any particular magic to Schedule D. But cheerfully signs the return, having turned in the phony documents with the intention of producing false results.

Is that correct?

MR. McENANY: Yes. This is a –

THE COURT: Then you'd have a great case if that's –

MR. McENANY: I'm sorry, Your Honor:

THE COURT: You'd have a great case if that's what you had here, that is, that she submitted documents to someone precisely for the purpose of their being a filing, without ever having looked at any particular schedule. That's not what this case is about.

MR. McENANY: No, Your Honor –

THE COURT: So that analogy doesn't work for you. This is not a strict liability statute.

MR. McENANY: No.

THE COURT: That's not what Hsia I said.

MR. McENANY: No, we're talking –

THE COURT: See, I can't understand and that's were the instruction is confusing me. It looks like you made this strict liability.

MR. McENANY: No, we charged and the District Court instructed the Jury on –

THE COURT: How can you willfully cause false reports if you don't know there's a reporting requirement? That's my simple question.

MR. McENANY: I think that you do in order to prove false –

THE COURT: The tax analogy doesn't work because you know there's a reporting requirement. You submit the information to the accountant. You just don't – and if it's fraudulent stuff, you don't look to see whether the fraudulent materials that you submitted were put in some schedule or not, but you knew there was a requirement. That's not what you have here.

So I don't know what – I'm not sure how your case builds.

MR. McENANY: Your Honor, our case builds –

THE COURT: If you don't show that she understands there's a reporting requirement of some sort.

MR. McENANY: We did show that. We showed that from soup to nuts.

THE COURT: What does the instruction mean? The instruction says quite the contrary, so if the Jury and I think, if I'm on a Jury and I think there's a question about that, the Judge has already told me, I don't have to worry about that.

MR. McENENY: But that instruction accurately reflects –

THE COURT: I don't think so. I think it

suggests strict liability and I don't think that's what Hsia I said.

MR. McENANY: No, the level of knowledge and intent that was made very clear in the Judge's charge and by the way this was not raised in the defendant's brief is the level of –

THE COURT: I thought she did raise somewhere that the Judge took away two elements of the false statement case. She raises that somewhere very specifically.

MR. McENANY: Your Honor, if I may just continue responding and then I'll answer yours.

The Court did charge the Jury with the completely standard language under Section 2B and 1001 on willful causation, knowledge of falsity and all that was in the context of as the Government's proof in fact showed Maria Hsia's knowledge of what the reporting requirments were. So this was by no means a strict liability type of offense. Maria Hsia didn't know that statements were being made and that they were false and that was charged to the Jury and that was completely proven.

THE COURT: Answer Judge Rogers' question and then your time is up.

MR. McENANY: Yes. The argument regarding

the charge that the defense did raise in its brief, the District Court erred in instructing the Jury that the courts have interpreted the Federal Election Campaign Act to require political committees to report the true source of contributions. I think that's just a correct statement of the law that –

THE COURT: I'm sorry, what did you say? I missed it.

MR. McENANY: I believe that I'm responding to the point Judge Rogers made that the issue that was raised by the defense as to the instructions was Judge Friedman's charge to the Jury that the Courts have interpreted the Federal Election Campaign Act to require political committees to report the true source of contributions.

The other point in the defense brief relating to the Judge's charge in the constructive amendment section of a brief which counsel alluded to, related to the concealment argument and I won't address that further unless there are any questions by the court on that.

THE COURT: I have a question. That is what was the Government's theory or evidence as to the defendant's motivation? The normal sort of stereotype is that people make or appear to make large

contributions so that they will get influence and credit in high places, but where is the –

MR. McENANY: We introduced evidence to that effect. we had testimony from – a deposition and I think some trial testimony from litigation that Maria Hsia had with her former business partner and companion, Howard Hom and part of that –

THE COURT: I'm sorry, Howard –

MR. McENANY: Howard Hom, H-O-M-. And in part of that, Maria Hsia explained the importance of having or appearing to have high political connections to running an immigration consulting business, pictures, arranging visits to politicians with clients –

THE COURT: But why do the high politicians turn up to have their picture taken unless they know the true source of the money?

MR. McENANY: You mean what did President Clinton know about –

THE COURT: No, what did somebody who she wanted to have her picture taken with know? That was a blank.

MR. McENANY: Not a darn thing as far as –

THE COURT: That was a blank.

MR. McENANY: As far as I'm aware. One of the contributors in this case, recently arrived from Mainland China said you know, get your picture taken with a high leader, you couldn't do that in China and here you pay $10,000 to get a picture taken.

THE COURT: Let me just ask you one more thing because I'm not sure your reading of Hsia I and mine are the same. I think Hsia I suggested that defendant couldn't argue that she didn't understand that the reports would be considered true source reports, but Hsia I didn't say that she didn't have to know about reporting requirements at all. And you're blurring the distinction. And that's why I'm concerned about the Jury instruction. They said – I agree. Hsia I says she can't make the argument that she didn't understand that these were true source reports, but that's not what we're focusing on.

MR. McENANY: No, I think what Hsia I did is –

THE COURT: What I'm telling you is my view of what it did not do. It did not go so far as to say, she doesn't have to know anything about reporting requirements.

MR. McENANY: No, I'm not disagreeing with the Court on that.

THE COURT: Well, then I don't understand the instruction. That's my point. The instruction seems to say she doesn't.

MR. McENANY: Well, the Hsia I Court did say that the level of specific intent required by the Third Circuit in Curran –

THE COURT: You can't keep going back to that, okay? That doesn't mean anything to me, okay? What I'm trying to say is I don't think Hsia I cut it the way you're saying. I'll have to go back and look. I think they meant to say was the true cause, she can't make the claim that well, I didn't know that's what the reports were being used for. Fine. I understand that.

I don't think the Court went so far as to say she's not required to know anything about reporting requirements. It doesn't matter whether she knows or not. I don't think that's what they said.

MR. McENANY: No, I'm not and I'm not reading that far either there. I'm just focusing on the Hsia I Court rejection of the Curran standard which was part of the decision.

THE COURT: Well, but see, if you agree with me that they didn't go as far as what I just said, then I don't know how you can support the

instruction that was given to the Jury.
MR. McENANY: Because we have the normal instruction on knowingly and willfully causing a false statement in conjunction with complete evidence of Maria Hsia's knowledge of exactly what the reporting requirements were.
THE COURT: No, I don't think you're answering my question. I don't know what that means. I'm focusing very specifically on the language that she doesn't have to -- you don't have to show that she knew the reporting requirements.
And you just got finished saying well, no, that's not what Hsia I said. You just got finished saying, you agreed with me that's not what Hsia I said and I don't think they said it either. I think they said that she couldn't make the argument about true source. That's all.
THE COURT: But we say quote that the defendant, the mens rea, simply by proof one that the defendant knew that the statements to be made were false and two, that the defendant intentionally caused such statements to be made, but the reference there is to the FEC reports.
THE COURT: Right, so she didn't know about the reports. You can't say there's no

requirements, but you show that. I don't see how you get that out of Hsia I and that's what the Jury instruction seems to say.

Okay, thank you.

MR. McENANY: Thank you, Your Honor.

THE COURT: You have a minute, no time on rebuttal. I'll give you a minute.

THE COURT: And the first thing you should do is identify precisely and where you made Jury instruction charges.

MS. LUQUE: Did you say I only had a minute, Your Honor?

THE COURT: Just answer the questions.

MS. LUQUE: I'm going to talk really fast.

THE COURT: No, first answer the question.

REBUTTAL ARGUMENT OF NANCY LUQUE, ESQ.
ON BEHALF OF APPELLANT, MARIA HSIA

I looked up this while I was sitting there, almost falling off my chair. It looks like on page 42 of the original brief where we made the initial argument about the true source instruction, the language is loose, but it's broader than just an objection to the true source instruction. And also, in the rebuttal brief or the reply brief at page 18, we talk about the issue of the knowing causation.

THE COURT: I'm sorry –
MS. LUQUE: Page 43 of the brief where we're talking about the Court's discussion.
THE COURT: I mean –
MS. LUQUE: Of the true source contribution, we say –
THE COURT: This passage doesn't seem to go to the –
MS. LUQUE: We say he said he didn't –
THE COURT: The section that Judge Edwards just read out earlier.
MS. LUQUE: Well, what Judge Friedman is saying is he didn't know how to instruct on the true source question and he reserved ruling on the issue of whether or not there was a reporting requirement in the law and the true source of the contribution has to be reported and whether or not there's a requirement before a certain date and then the paragraph goes on to talk about how that instruction affected knowing causation, would affect knowing causation. As I said, it's a little broader than just that one instruction.
THE COURT: The thing you focus on is the Courts have interpreted these provisions to require political committees to report the true source of the contributions.

MS. LUQUE: Right, which we thought caused a broader problem by subsuming the issue of knowing causation.

In the reply brief, at page –

THE COURT: That's really subtle.

MS. LUQUE: In the reply brief at page 18, we expound on it a little more. Do I wish I had made the argument as Judge Edwards just made it, yes, I do.

But we did argue vociferously over Jury instructions. We objected to every one. We argued about this true source instruction for hours and we also argued about whether or not Maria Hsia – we specifically asked for an instruction on knowing and willful.

One thing I wanted to point out in the Jury instructions also is when the Judge first defines the issue of statement, he there also doesn't say that Maria Hsia had to know about the statement. He said the campaign treasurer has to make it, so it's complicated in the instructions as a whole.

I also want to bring to the Court's attention, of course, the Court is familiar with United States versus Tobon-Builes, which is – I don't know if that's the right way to pronounce it – but it makes the point that Judge Edwards has been focusing

on which is there's a difference between something not requiring specific intent and reading willfulness out which I think these instructions did.

THE COURT: What was the citation?

MS. LUQUE: 706 F.2d 1092, Tobon-Builes.

THE COURT: That's all right.

MS. LUQUE: Your Honor, I wanted to make one point as to –

THE COURT: Make your last point, because you're out of time.

THE COURT: I just want to ask, did you ever say that Judge Friedman's charge in any way fell short of what we stated in Hsia I, this is page 522, first column, second paragraph, second paragraph that starts there, the natural reading of 2(b)1001 was this, the Government is to show mens rea simply by proof (1) that the defendant knew the statements to be made were false; and the defendant intentionally caused such statements to be made by another.

MS. LUQUE: Did we say to –

THE COURT: You say his charge fell short of that?

MS. LUQUE: Yes. At the time we requested Jury instructions, we told him he couldn't – he had to have willful in every element of the statute. Our

proposed Jury instruction. I don't know if they're part of the record –

THE COURT: I don't know about the magic word "willful", this says "knew the statements to be made were false and intentionally caused such statements to be made."

MS. LUQUE: Yes, Your Honor. I believe your holding had to do with whether they had to prove specific intent. That is whether she knew her conduct was illegal, whether she knew the reporting requirements were illegal.

I always believed and our Jury suggestions suggest that the Government had to prove she knew there was a reporting requirement, that she had to know that there was a statement.

THE COURT: This says she has to know – she has to have intentionally caused the statements to be made.

MS. LUQUE: In order to have done that, she would have to have know a statement exist or there would be a statement –

THE COURT: A lot could turn on what you mean "a statement."

MS. LUQUE: This is a false statement –

THE COURT: She knew that the data was not

being collected for fun.

MS. LUQUE: Your Honor, this is my last point. This is an affirmative false statements case. This Court, in a case I cited which is Wilson, which is Your Honor's decision, Judge Rogers, this Court gives scrutiny to sufficiency of the evidence in murders, in gun cases, in drug cases.

This is a sensitive first amendment issue. This is a campaign contribution. We have attenuation. We have inference upon inference. We don't have a clear statement. We don't have an affirmative statement. We don't have witnesses who come and say well, maybe it doesn't say that, but this is what it means. We have nothing close to a false statement. What we have is a contribution in the name of another and I would ask the court to scrutinize this record very carefully because you will not find false statements anywhere in the evidence and you will not find knowing causation of false statements because there's no evidence she knew of the reporting requirement.

THE COURT: Okay. Thank you.

MS. LUQUE: Thank you, Your Honors, I'm sorry I went so far over.

THE COURT: That's all right. Ms. Luque,

you were appointed by the Court to represent the Appellant in this case and we thank you for your assistance.

MS. LUQUE: Thank you.

THE COURT: All right.

(Whereupon, oral argument was concluded.)

CERTIFICATE OF TRANSCRIBER

MATTER: UNITED STATES OF AMERICA,
Appellee,

v.

MARIA HSIA,
Appellant.

DATE: WEDNESDAY, NOVEMBER 14, 2001

I hereby certify that the attached transcription of pages 1 to 51 inclusive are to the best of my belief and ability a true, accurate, and complete record of the proceedings as recorded on tape provided to us by the U.S. Court of Appeals for the D.C. Circuit.

/s/ Francesca Fook

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-3013 **September Term, 2001**
98cr00057-01

United States of America,
Appellee **Filed On: Feb. 15, 2002**

v.

Maria Hsia, a/k/a Hsia Ling,
Appellant

BEFORE: Edwards & Rogers,* Circuit Judges; and
Williams, Senior Circuit Judge.

ORDER

Upon consideration of appellant's petition for rehearing filed January 25, 2002, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: _____
Michael C. McGrail
Deputy Clerk

*Circuit Judge Rogers did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-3013 **September Term, 2001**
98cr00057-01

United States of America,
Appellee **Filed On: Feb. 15, 2002**

v.

Maria Hsia, a/k/a Hsia Ling,
Appellant

BEFORE: Ginsburg, Chief Judge; Edwards, Sentelle, Henderson, Randolph, Rogers,* Tatel and Garland, * Circuit Judges; and Williams, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: _____
Michael C. McGrail
Deputy Clerk

*Circuit Judges Rogers & Garland did not participate in this matter.

APPENDIX G
RELEVANT STATUTORY PROVISIONS

2 U.S.C. § 437g. Enforcement

(a) Administrative and judicial practice and procedure

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of Title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the

factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4)(A)(i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of Title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B)(i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of Title 26, the Commission shall make public such determination.

(5)(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or

expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of Title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of Title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under

subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of Title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of Title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8)(A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may

declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(10) Repealed. Pub. L. 98-620, Title IV, § 402(1)(A), Nov. 8, 1984, 98 Stat. 3357

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12)(A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully

violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports

Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) Reports by Attorney General of apparent violations

Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) Penalties; defenses; mitigation of offenses

(1)(A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year,

or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) of this section which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of Title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant

and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

Supreme Court, U.S.
FILED
JUL 22 2002
OFFICE OF THE CLERK

No. 01-1695

In the Supreme Court of the United States

MARIA HSIA, AKA HSIA LING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
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Counsel of Record

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QUESTIONS PRESENTED

1. Whether a prosecution for causing political committees to submit materially false statements to the Federal Election Commission, in violation of 18 U.S.C. 1001 and 18 U.S.C. 2(b), requires proof that the defendant knew that her conduct was unlawful.

2. Whether the court of appeals erred in failing to review a jury instruction that defendant did not challenge in the district court or in her opening brief on appeal.

3. Whether conduct that violates provisions of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, must be prosecuted under FECA's criminal enforcement provisions, or may be prosecuted under general federal criminal provisions in Title 18 of the United States Code.

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In the Supreme Court of the United States

No. 01-1695

MARIA HSIA, AKA HSIA LING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 3a-6a) affirming petitioner's convictions is not reported. A prior opinion of the court of appeals reversing the district court's dismissal of the false statement counts of the indictment (Pet. App. 7a-24a) is reported at 176 F.3d 517. This Court's denial of certiorari to review that decision is noted at 528 U.S. 1136. The district court's opinion dismissing the indictment's false statement counts (Pet. App. 25a-87a) is reported at 24 F. Supp.2d 33.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on December 11, 2001. A petition for rehearing was denied on February 15, 2002 (Pet. App. 161a-162a). The petition for a writ of certiorari was filed on May 15, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury in the District of Columbia indicted petitioner on, *inter alia*, five counts of causing political committees to submit materially false statements to the Federal Election Commission (FEC), in violation of 18 U.S.C. 1001 and 18 U.S.C. 2(b). The district court dismissed the false statement counts, Pet. App. 25a-87a, and the court of appeals reversed. *Id.* at 7a-24a. Following a jury trial, petitioner was convicted on all five false statement counts. She was sentenced to three years' probation, with the first 90 days in home detention, plus 250 hours of community service, and a total fine of $5000. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1a-6a.

1. a. The Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, imposes limits on contributions to candidates for federal office. Individuals may contribute no more than $1000 to any candidate with respect to any election, and may contribute no more than $25,000 to political committees in any calendar year. 2 U.S.C. 441a(a)(1)(A), 441a(a)(3). Corporations are prohibited altogether from making contributions in connection with federal elections. 2 U.S.C. 441b. To ensure that the Act's contribution limitations are not easily evaded, FECA provides that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be

used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another." 2 U.S.C. 441f. Further, the Act requires political committees to keep detailed records of their financial activities and to file periodic reports with the FEC disclosing, *inter alia*, the name, mailing address, occupation, and employer of each "person (other than a political committee) who makes a contribution" to the committee and whose aggregate annual contributions exceed $200. 2 U.S.C. 431(13), 434(b)(3)(A). See Pet. App. 26a-27a; Gov't C.A. Br. 3-4.

The FEC administers FECA and has exclusive jurisdiction over civil enforcement. 2 U.S.C. 437c(b). As recently amended, the Act provides criminal penalties for "knowing[] and willful[]" violations of the conduit contribution ban, up to a maximum of five years' imprisonment. See Act of Mar. 27, 2002, Pub. L. No. 107-155, § 315(b), 116 Stat. 108 (providing for five years' imprisonment for offenses involving $25,000 or more in a calendar year and two years' imprisonment for offenses involving more than $10,000 and less than $25,000). At the time of the events at issue here, however, the maximum sentence of imprisonment for a knowing and willful violation of the Act was one year. 2 U.S.C. 437g(d)(1)(A).

b. Petitioner, an immigration consultant in the Los Angeles area, acted as a fundraiser for local, state, and federal election campaigns. Gov't C.A. Br. 3-5. As a result of her fundraising activities, petitioner was familiar with federal contribution limits, and knew that donor cards had to be filled out when a federal election contribution was made, that the names of contributors must be reported to the FEC, and that contributions

could not be made in the name of another. Gov't C.A. Br. 5-7.

One of petitioner's immigration clients was the International Buddhist Progress Society (IBPS), which operates the Hsi Lai Temple in Hacienda Heights, California. The IBPS is a tax-exempt religious organization incorporated in California and prohibited from participating in political campaigns under 26 U.S.C. 501(c)(3). Beginning in the spring of 1995, petitioner used straw contributors to funnel money from the IBPS and other improper sources to various political committees. Petitioner either would find and solicit individuals to serve as nominal contributors or ask others (including IBPS) to do so. Some of the conduits were nuns, monks, and volunteers from IBPS, while others were friends and associates of petitioner. In one instance, petitioner herself acted as a straw contributor. The nominal contributors were reimbursed in full by the actual contributors, including IBPS. Petitioner did not disclose to the political committees that received the contributions that they had been made through conduits. Accordingly, the political committees reported the names of the straw contributors to the FEC. Gov't C.A. Br. 4-17.

An indictment issued by a federal grand jury in the District of Columbia charged petitioner with, *inter alia*, five counts of causing false statements, in violation of 18 U.S.C. 1001 and 18 U.S.C. 2(b).[1] The indictment alleged that petitioner willfully caused the political committees that were the recipients of conduit contributions to

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[1] The indictment also alleged that petitioner conspired to defraud the FEC and the INS, in violation of 18 U.S.C. 371. That count was dismissed on the government's motion before trial. Gov't C.A. Br. 2.

submit materially false statements to the FEC. The reports filed were false because the political committees listed the conduit contributions as being from their nominal sources, although the true sources were IBPS and petitioner's immigration clients. Pet. App. 10a; Gov't C.A. Br. 1-3.

2. The district court dismissed the indictment's false statement counts on a variety of theories. Pet. App. 65a-87a. Among other things, the court noted that, in its view, showing that petitioner acted knowingly and willfully under Sections 1001 and 2(b) in causing a false statement to be made would require proof that she knew that her conduct was illegal—*i.e.*, that she "knew of the [political party] treasurers' reporting obligation, that [she] attempted to frustrate those obligations [*sic*], and that [she] knew [her] conduct was unlawful," Pet. App. 84a n.32. The court stated that "[i]t is difficult, if not impossible * * * to imagine how the government possibly could prove" those facts in this case. *Ibid.* Although the district court dismissed the false statement counts, it rejected petitioner's contention that the indictment must be brought under the FECA or not at all, concluding that the FECA did not impliedly repeal the more general provisions of the federal criminal code. Pet. App. 29a-44a.

3. The court of appeals reversed and reinstated the false statement charges. Pet. App. 7a-24a. With respect to the issues presented in the petition for certiorari, the court of appeals held that the government was not required to prove that petitioner knew her conduct was unlawful. The court reasoned that because petitioner was charged with causing a false statement offense, the government could show the necessary mens rea "simply by proof (1) that [petitioner] knew that the statements to be made were false (the mens rea for the

underlying offense—§ 1001) and (2) that [petitioner] intentionally caused such statements to be made by another (the additional means rea for § 2(b))." *Id.* at 11a-12a. While acknowledging that the Third Circuit had reached a contrary result in *United States* v. *Curran*, 20 F.3d 560 (1994), the court concluded that the *Curran* decision relied on an overly broad reading of this Court's opinion in *Ratzlaf* v. *United States*, 510 U.S. 135 (1994). Pet. App. 12a. The court accordingly held that "nothing in the indictment's allegations contradicts the government's capacity to prove the statutorily required mens rea." *Ibid.*

In addition, relying on the settled presumption against repeal by implication, the court of appeals agreed with the district court that FECA did not impliedly repeal Sections 1001 and 2, insofar as those provisions prohibited an individual from causing false statements to be made by political committees. Pet. App. 18a-20a. The court explained that it "will not find repeal [by implication] absent 'clear and manifest' evidence that it was intended." *Id.* at 19a. The court concluded that "[petitioner] presents no evidence of this sort." *Ibid.*

4. At trial, petitioner attempted to establish, through cross-examination of the government's witnesses, that certain FEC regulations were complex or confusing and were not necessarily understood by community activists or fundraisers. Supp. Gov't C.A. Br. 3-5. Anticipating this defense, the government requested that the jury be instructed as follows:

> **Falsity and Knowledge of Falsity** . . . . . In this case, the Government asserts that the defendant knew that she would be causing false or fictitious statements to be made because in each instance

> charged in the Indictment she knew who the actual source of the political contributions was, and also knew that the names of the different conduits would be reported as being the actual contributors. It is not necessary for the Government to prove that the defendant knew of the specific reporting requirements of the FEC, or that she knew conduit contributions were specifically prohibited, to establish that the defendant knew the names of the different conduits would be reported as being the actual contributors, but you may take into consideration any knowledge you find the defendant did have concerning FEC reporting requirements and prohibitions in deciding whether she did in fact know that the names of the different conduits would be reported as being the actual contributors.

Supp. Gov't C.A. Br. 6. Other than submitting a generic instruction on false statements, petitioner made no specific objection to the government's proposed language. Petitioner's proposed instructions contained no reference to any specific knowledge that she had to have regarding FEC reporting procedures. *Id.* at 7.

The district court's instructions on the elements of causing a false statement to be made under 18 U.S.C. 1001 and 18 U.S.C. 2(b) included the following language:

> The first two elements are that a political committee treasurer must have made a false statement or representation to the FEC and that the defendant must have known that the statement or representation was false.
>
> The Government is not required in this regard to prove that the defendant knew of the specific reporting requirements or prohibitions of the FEC

> or that she knew whether conduit contributions were specifically prohibited. But the Government must prove beyond a reasonable doubt that she knowingly and willfully caused false statements to be made.

Supp. Gov. C.A. Br. 1-2. Petitioner did not object to this instruction.

5. On appeal, petitioner's opening brief challenged certain aspects of the district court's jury instructions, but it made no mention of the jury instruction that stated that the government did not have to prove that she knew of the specific reporting requirements or prohibitions of the FEC. Pet. C.A. Br. 42-44. Petitioner first mentioned that instruction in a footnote to her reply brief. Pet. C.A. Reply Br. 12 n.15. After the appellate panel suggested at oral argument that this instruction might be inconsistent with its holding on the interlocutory appeal, Pet. App. 141a-153a, the parties filed supplemental briefs addressing that concern.

The court of appeals affirmed in an unpublished *per curiam* memorandum. Pet. App. 3a-6a. With respect to the jury instruction issue addressed in the supplemental briefs, the court found that "[b]ecause [petitioner] did not argue in her opening brief that the district court's instructions to the jury failed to conform with *Hsia I*, 176 F.3d at 522, insofar as the jury was instructed that it did not have to find that Hsia was aware of a reporting requirement, we do not reach that issue." Pet. App. 4a; see *ibid.* ("[b]ecause [petitioner] did not properly raise on appeal claims about jury instructions on the required finding of her knowledge of reporting requirements, this court cannot disturb the jury's finding that [her] causation of false reports being filed was willful.").

ARGUMENT

Petitioner contends that there is a conflict in the circuits that warrants further review of the court of appeals' holding that the government need not prove that petitioner knew that her acts were unlawful in order to convict her on the false statement counts. Review of that narrow legal issue is not justified because the practical difference between the approaches adopted by the courts is relatively small and because the Third Circuit may choose to reconsider its approach in light of decisions from two other circuits critiquing its approach. Petitioner's related challenge to the district court's jury instructions does not merit certiorari review because it was neither pressed nor passed upon below.

Petitioner also argues that the false statement counts must be dismissed, because, in her view the FECA is the exclusive means of enforcing compliance with the federal election laws. The decision of the court of appeals rejecting petitioner's contention is correct, and it does not conflict with any decision of any other court of appeals. Further review of that question is therefore unwarranted.

1. The court of appeals in this case held that, in a "conduit contribution" campaign finance case brought pursuant to Sections 1001 and 2(b), the government must prove that the defendant intentionally caused statements to be made that she knew to be false, but that the government need not prove that the defendant knew that her conduct was illegal. Petitioner contends (Pet. 15-19) that proof of knowledge of illegality is required. Petitioner claims that the court of appeals' ruling conflicts with this Court's decision in *Ratzlaf* v.

United States, 510 U.S. 135 (1994), and that of the Third Circuit in *United States* v. *Curran*, 20 F.3d 560 (1994).

a. The false statement statute, 18 U.S.C. 1001, requires proof that the defendant "knowingly and willfully" made a materially false statement, and that the statement was made in a matter within federal agency jurisdiction. *United States* v. *Leal*, 30 F.3d 577, 584 (5th Cir. 1994), cert. denied, 513 U.S. 1182 (1995). The term "knowingly" requires the government to prove that the defendant was aware the statement was false when she made it. *United States* v. *Steinhilber*, 484 F.2d 386, 389-390 (8th Cir. 1973); see *United States* v. *Bakhtiari*, 913 F.2d 1053, 1059-1061 (2d Cir. 1990) (citing cases), cert. denied, 499 U.S. 924 (1991); *United States* v. *Oakar*, 111 F.3d 146, 158 (D.C. Cir. 1997) (Williams, J., concurring in part and dissenting in part). The term "willfully" in Section 1001 has been consistently interpreted to mean that the defendant acted "deliberately" in conveying false information to another, but it too does not require proof that the defendant knew that making the statement was illegal. See, *e.g.*, *United States* v. *Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990). See also *Cheek* v. *United States*, 498 U.S. 192, 209 (1991) (Scalia, J., concurring) (noting the general rule that "willfully" "refers to consciousness of the act but not to consciousness that the act is unlawful"). Indeed, "defining the term 'willfully' [in a Section 1001 prosecution] to require a knowing violation of the law would circumvent the holding of *United States* v. *Yermian*, 468 U.S. 63, 68-76 (1984), that actual knowledge of federal agency jurisdiction is not required to prove a violation of § 1001." *United States* v. *Daughtry*, 48 F.3d 829, 831 (4th Cir.), vacated on other grounds, 516 U.S. 984 (1995).

This Court's decision in *Ratzlaf* does not support petitioner's contention that Section 1001 requires proof that petitioner knew her conduct was illegal. *Ratzlaf* involved the statutory prohibition against structuring currency transactions "for the purpose of evading" certain reporting requirements. The Court held that the criminal prohibition against "willfully violat[ing]" the anti-structuring provision required proof that the defendant knew that the structuring was unlawful. See 510 U.S. at 138, 149. The Court in *Ratzlaf* relied significantly on the consideration that the underlying provision required a "purpose of evading" the structuring law, so that "willfully" would be superfluous if read to require only deliberate action; the Court did not establish a *per se* rule that a conviction for "willful" acts requires proof that the defendant understood the illegality of his conduct. To the contrary, the Court recognized that the term "[w]illful" is a "word of many meanings," and "its construction [is] often . . . influenced by its context." *Id.* at 141. The *Ratzlaf* Court explicitly reaffirmed the "venerable principle" that ignorance of the law is not a defense. *Id.* at 149. See also *Bryan* v. *United States*, 524 U.S. 184, 193-196 (1998) (declining to apply *Ratzlaf*'s definition of "willfully" to 18 U.S.C. 924(a)(1)(D)). Following *Ratzlaf*, the courts of appeals have continued to hold that the term "willfully" in Section 1001 means deliberate action, not knowledge that the conduct pursued is unlawful. *Daughtry*, 48 F.3d at 831-832; *United States* v. *Rodriguez-Rios*, 14 F.3d 1040, 1048 n. 21 (5th Cir. 1994) (en banc).

The fact that petitioner was charged under Section 2(b), which contains its own "willful[ness]" requirement, does not alter the result. Section 2 does not itself define a substantive offense, but rather "'describes the

kinds of individuals who can be held responsible for a crime.'" *United States* v. *Armstrong*, 909 F.2d 1238, 1243 (9th Cir.) (citation omitted), cert. denied, 498 U.S. 870 (1990). Under Section 2(b), an individual who causes an intermediary to commit a crime is culpable himself, so long as he possesses the intent to commit the underlying offense. *United States* v. *Gabriel*, 125 F.3d 89, 98 (2d Cir. 1997); *United States* v. *Michaels*, 796 F.2d 1112, 1117-1118 (9th Cir. 1986), cert. denied, 479 U.S. 1038 (1987). Accordingly, "an indictment [under Section 2(b)] is sufficient if it alleges the criminal intent required for the substantive offense." *United States* v. *Cook*, 586 F.2d 572, 575 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979). Thus, as the court of appeals properly held, the requirement in Section 2(b) that the defendant "willfully cause[d]" an offense means only that the defendant intended to bring about the act constituting the crime, see, *e.g.*, *United States* v. *West Indies Transport, Inc.*, 127 F.3d 299, 307 (3d Cir. 1997), cert. denied, 522 U.S. 1052 (1998), not that he must know that his conduct is unlawful, see, *e.g.*, *United States* v. *Michaels*, 796 F.2d at 1117-1118.

b. Petitioner correctly notes (Pet. 15-16) that the Third Circuit has held that, when the government proceeds under Sections 2(b) and 1001 in a federal election law prosecution, "[t]he intent element differs from that needed when the prosecution proceeds directly under section 1001." *United States* v. *Curran*, 20 F.3d at 567. According to the Third Circuit, "a proper charge for willfulness in cases brought under sections 2(b) and 1001 in the federal election law context requires the prosecution to prove that defendant knew of the treasurers' reporting obligations, that he attempted to frustrate those obligations, *and that he knew his conduct was unlawful*." *Id.* at 569 (emphasis

added). The *Curran* court relied on what it perceived to be similarities between the currency reporting laws at issue in *Ratzlaff* and the federal election statutes. *Ibid.* The court did not explain how its view that Sections 1001 and 2(b) require proof of knowledge of illegality in the federal election law context can be squared with settled interpretations of both statutes, which establish that neither requires proof of knowledge of illegality in other contexts. See *United States* v. *Gabriel*, 125 F.3d at 101-102 (rejecting *Curran* and holding that "the considerations that led the *Ratzlaf* Court to interpret 'willfully' to require a knowing violation of the law under section 5322 are of little aid in interpreting section 2(b).").

The disagreement between the District of Columbia Circuit and the Third Circuit does not warrant further review because the difference in practice between the positions of the two courts on this issue is not necessarily great. In a conduit contribution case brought under Sections 1001 and 2(b), both courts require the government to prove that the defendant caused, and intended to cause, a political committee to make a statement (that the named individual is the contributor) that the defendant knew to be false (in that the individual named as the contributor is not the true source of the funds). In order to prove the defendant's knowledge that that statement is false, the government ordinarily will have to show that the defendant knew that the political committee's listing of a particular person as the contributor means that that person was "the true source of the money," rather than "the person in whose name money is given." Pet. App. 16a. Thus, although the court of appeals in this case held that the government need not prove that the defendant knew that making that kind of false statement is illegal, in

cases like this the government will ordinarily show that the defendant had some knowledge of the law in order to show the defendant's knowledge of falsity. That "preclude[s] the possibility that criminal penalties [will be] imposed on the basis of innocent conduct." *United States* v. *Daughtry*, 48 F.3d at 832. In practice, the result may be similar to the proof required in the Third Circuit under *Curran*.[2]

In addition, the Third Circuit has not had an opportunity to revisit *Curran* since it was decided eight years ago. In light of the Second Circuit and D.C. Circuit decisions expressly disagreeing with *Curran*'s reasoning, it is possible that the Third Circuit might choose to overrule *Curran* if the issue were to arise again. Accordingly, certiorari review is not required to review the narrow circuit split over the application of 18 U.S.C. 2(b) and 18 U.S.C. 1001 to campaign finance violations.

2. Petitioner contends (Pet. 20-21) that this Court should grant review to determine whether the district court erred in instructing the jury that the government was not required to prove that the defendant knew of the specific reporting requirements or prohibitions of

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[2] Petitioner raised the same claim in her petition for certiorari review of the D.C. Circuit's interlocutory decision. In response, the government noted that "[t]he question presented in this case can * * * best be considered in a more concrete factual setting and with the benefit of the precise jury instructions that were given." 99-680 United States Br. in Opp. at 12. Although the trial record now supplies a "more concrete factual setting," petitioner's belated contention that the district court's jury instructions do not accord with the District of Columbia Circuit's interlocutory decision (Pet. 14 & nn. 14 & 15) continues to make this case a poor vehicle for considering any conflict between the Third and District of Columbia Circuits.

the FEC. As the government explained in its supplemental appellate brief, the instruction to which petitioner objects was not erroneous when considered in the context of the jury instructions as a whole and the facts of this case. In particular, the government never contended—and the instruction in context would not have been understood to state—that the defendant could be found guilty of causing the false statements absent proof that she knew that federal election contributions were reported to the FEC.[3] Indeed, the government introduced substantial proof of that knowledge at trial. Likewise, the court's instruction would not have been understood to relieve the jury of finding that the defendant had a general knowledge of the federal election reporting scheme. It simply made clear, in response to petitioner's claims about the complexity of the election laws, that she did not need to know of "the specific reporting requirements or prohibitions of the FEC," Pet. App. 100a, including the specific provision prohibiting conduit contributions. See Supp. Gov't C.A. Br. 2-3. The fact that petitioner did not object to the instruction when it was given suggests that that is precisely how it was understood by those present.

In any event, the court of appeals declined to consider petitioner's objection because it was not properly

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[3] Petitioner states that "[n]owhere in the court's instructions were the jurors told that Petitioner had to know that statements would be made *or* that they would be false." Pet. 14. The jury was specifically instructed, however, that to "sustain its burden of proof," the government had to prove "beyond a reasonable doubt" that "a political committee treasurer made a false statement or representation to the Federal Election Commission," that "[petitioner] knew that the statement or representation was false," and that "[petitioner] caused the false statement or representation to be made." Pet. App. 98a.

raised in either the district court or the court of appeals. Pet. App. 4a; see Pet. Reply to Gov't Supp. C.A. Br. 9 (Petitioner acknowledges that "[t]he objection to the jury instruction at issue was not properly preserved below."). This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation omitted); see *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999) *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Surely the court of appeals' determination, in its unpublished opinion, not to address petitioner's belated claim does not conflict with any decision of any other court, bind the court of appeals in future cases to any particular view regarding the propriety of the instruction, or otherwise present a legal issue that warrants further review.

Petitioner contends (Pet. 15 & n.16) that the court of appeals should have considered her claim under the plain error standard. Courts of appeals, however, are not required to conduct plain error review of claims raised for the first time in a reply brief. Absent exceptional circumstances, appellate courts "generally will not entertain arguments omitted from an appellant's opening brief and raised initially in his reply brief." See *McBride* v. *Merrell Dow & Pharm. Inc.*, 800 F.2d 1208, 1210 (D.C. Cir. 1986). While the court of appeals has discretion to reach such claims in exceptional circumstances, see *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 447-448 (1993), the question of whether it properly declined to exercise that discretion here does not warrant further review.

3. Petitioner argues (Pet. 22-27) that FECA is the exclusive means of enforcing compliance with its reporting provisions and thus repeals *pro tanto* the more general criminal provisions of the false statements statute, 18 U.S.C. 1001. Both courts below, consistent with every court of appeals that has addressed the issue (including the Third Circuit in *Curran*, see 20 F.3d at 565-566), correctly held that FECA does not repeal by implication the more general provisions of the false statements statute. Further review is therefore unwarranted.

a. It is a "cardinal principle of [statutory] construction that repeals by implication are not favored." *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *Randall* v. *Loftsgaarden*, 478 U.S. 647, 661 (1986); *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). As the Court has explained, "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *United States* v. *Borden Co.*, 308 U.S. at 198. A legislative intent to repeal must be "clear and manifest," and it is not enough to show that a subsequent statute "cover[s] some or even all of the cases provided for by [the prior act]," *ibid.*, or that "the two statutes produce differing results when applied to the same factual situation," *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979). That principle fully applies when conduct violates more than one criminal statute. Absent an "intent to repeal * * * manifest in the 'positive repugnancy'" between two overlapping criminal statutes, decisions as to "[w]hether to prosecute and what charge to file or bring before a grand jury * * * generally rest in the prosecutor's discretion." *Id.* at 122, 124 (overlapping gun provisions). See

United States v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952).[4]

This case does not justify the invocation of either of the two exceptions to the rule severely disfavoring implied repeals—where there is "irreconcilable conflict" between the two statutes or where "the later act covers the whole situation of the earlier one and is clearly intended as a substitute." *Randall* v. *Loftsgaarden*, 478 U.S. at 661. There is no "conflict" or "positive repugnancy" between the FECA and the false statements statute: FECA imposes limits on contributions to candidates for federal office and requires political committees to keep records of their financial activities and file periodic reports with the FEC disclosing the identity of persons making contributions to the committee. The false statement statute at the time relevant to this case, see Pet. App. 10a n.2, proscribed the willful making of any materially false statement "in any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1001. Both statutes define distinct criminal offenses and, by refraining from committing both offenses, individuals may easily comply with both statutes. In addition, since the recent amendment, both statutes carry the same maximum sentence of five years' imprisonment. Pub. L. No. 107-155, § 315(b), 116 Stat. 108 (March 27, 2002) (increasing penalty to five years' imprisonment

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[4] Petitioner's attack (Pet. 8-10, 24) on the evolution of the Department of Justice's approach to prosecution of election campaign violations, as reflected in successive editions of the Department manual, *Federal Prosecution of Election Offenses*, is misdirected. In fact, that evolution reflects cautious consideration, guided by accumulated experience and relevant legal developments, of how prosecutorial discretion might best be exercised in attacking criminal conduct in election campaigns.

for offenses involving $25,000 or more in any calendar year and two years' imprisonment for offenses involving more than $10,000 and less than $25,000).[5]

Nor does either statute cover "the whole situation" of the other. In order to prove a violation of Section 1001 (or of Sections 1001 and 2), the government has to prove that a false statement was made—a fact not necessary for proof of a criminal FECA violation under 2 U.S.C. 437g(d), which may simply involve the making of an illegal contribution. And Section 1001 applies to false statements within the jurisdiction of any federal agency, not merely statements made to the FEC. In order to prove a violation of FECA's criminal prohibitions, by contrast, the government must prove a violation of a provision of the FECA, which of course is not necessary in a prosecution under Section 1001. Each statute thus prohibits substantial conduct that is not prohibited by the other.

Petitioner argues (Pet. 23-25) that Congress intended in enacting FECA to regulate all aspects of campaign finances, and that Congress therefore did not intend that campaign reporting violations would be prosecuted under the false statements statute. But the general rule disfavoring implied repeals has been applied even in situations where Congress has enacted subsequent

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[5] Petitioner's emphasis on the misdemeanor penalty that was authorized under FECA (see Pet. 8, 24, 27) is misplaced in light of the new amendments. As noted in the text, FECA now authorizes a felony prosecution for a violation of its conduit contribution ban and, in the case of conduit contributions involving $25,000 or more, the maximum penalty for that felony is the same five years' imprisonment provided for under the false statements statute, 18 U.S.C. 1001. The convergence of the penalties under FECA and under Section 1001 further reduces the practical importance of the issue petitioner seeks to present.

legislation that may be characterized as "comprehensive" and has also established an administrative agency with regulatory jurisdiction in the area. In *Edwards* v. *United States*, 312 U.S. 473, 484 (1941), the Court summarily rejected an argument that the Securities Act of 1933 repealed the provisions of the mail fraud statute insofar as they covered securities, noting that "[t]he two can exist and be useful, side by side." Similarly, the Court in *United States* v. *Noveck*, 273 U.S. 202, 205 (1927), rejected an argument that a statute prohibiting anyone from "willfully attempt[ing] in any manner to defeat or evade" an income tax impliedly repealed the general perjury statute, insofar as that statute applied to perjurious statements on a tax return. The Court noted that there "was confessedly no express repeal" and that "it is clear that the two sections are not inconsistent." *Id.* at 206. Because the two offenses "are entirely distinct in point of law, even when they arise out of the same transaction or act," the Court found that the conclusion that "Congress must have intended" an implied repeal "does not follow." *Ibid.* See, *e.g.*, *United States* v. *Moore*, 423 U.S. 122, 138 (1975) (prosecution for drug distribution rather than for violation of registration provisions); *United States* v. *Tomeny*, 144 F.3d 749 (11th Cir. 1998) (misdemeanor false statement provision of the Magnuson-Stevens Fishery Conservation and Management Act did not preempt felony prosecution under 18 U.S.C. 1001); *United States* *Mitchell*, 39 F.3d 465, 471- 476 (4th Cir. 1994) (provision of misdemeanors for violation of Endangered Species Act of 1973 and Department of Agriculture regulations do not preclude

felony prosecution for violation of those regulations under 18 U.S.C. 545), cert. denied, 515 U.S. 1142 (1995).[6]

The cases relied on by petitioner (Pet. 22-23) for the proposition that "broad, general criminal statutes do not apply to an area specifically and comprehensively regulated by a targeted statute[ ],"[7] are inapposite. In each of those cases, the court declined to find that the challenged conduct was covered by a "broad, general criminal statute," because the language of that statute did not "plainly and unmistakably" cover the conduct,

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[6] See *United States* v. *Parsons*, 967 F.2d 452, 456 (10th Cir. 1992) (false statements to Internal Revenue Service may be prosecuted under either Section 1001 or the specific provisions of the Internal Revenue Code); *United States* v. *Bilzerian*, 926 F.2d 1285, 1299-1304 (2d Cir.) (antifraud provisions of Securities Exchange Act of 1934 do not preclude prosecution under 18 U.S.C. 1001), cert. denied, 502 U.S. 813 (1991); *United States* v. *Jackson*, 805 F.2d 457, 459-464 (2d Cir. 1986) (misdemeanor provisions of 18 U.S.C. 510 do not preclude felony prosecution under general conversion statute, 18 U.S.C. 641), cert. denied, 480 U.S. 922 (1987); *United States* v. *Hansen*, 772 F.2d 940, 944 (D.C. Cir. 1985) (civil enforcement provisions of Ethics in Government Act of 1978 did not repeal application of Section 1001 to false statements made in reports filed pursuant to its disclosure provisions), cert. denied, 475 U.S. 1045 (1986); *United States* v. *Brien*, 617 F.2d 299, 309-311 (1st Cir.) (antifraud provisions of the Commodity Futures Trading Commission Act of 1974 did not preempt or implicitly repeal the general mail and wire fraud statutes), cert. denied, 446 U.S. 919 (1980).

[7] See *Dowling* v. *United States*, 473 U.S. 207 (1985); *United States* v. *Enmons*, 410 U.S. 396 (1973); *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 412 (1972); *United States* v. *Johnson*, 390 U.S. 563, 564-566 (1968); *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967); *NLRB* v. *Drivers Local Union*, 362 U.S. 274, 291-292 (1960); *United States* v. *Boffa*, 688 F.2d 919, 928-929 (3d Cir. 1982); *United States* v. *DeLaurentis*, 491 F.2d 208, 214 (2d Cir. 1974).

Dowling v. *United States*, 473 U.S. 207, 228 (1985), whereas another, narrower statute squarely targeted such conduct. Unlike the situation in those cases, where there was "ambiguity concerning the ambit" of the broader statute, *id.* at 229, there is no question that the false statements statute covers the false reports involved in this case.

The two other courts of appeals that have considered the precise issue presented here have rejected the contention that campaign reporting violations may be prosecuted only under the misdemeanor provisions of FECA. See *United States* v. *Hopkins*, 916 F.2d at 218 (finding "no indication in the federal election laws that Congress intended them to supplant the general criminal statutes found in Title 18"); *United States* v. *Curran*, 20 F.3d at 566 (noting that "an examination of the legislative history of the Election Campaign Act and its amendments uncovers no express evidence that the Act was intended to preempt the general criminal provisions under 18 U.S.C. §§ 2(b), 371, or 1001").

Petitioner argues (Pet. 26) that the false statement statute cannot be applied to her conduct, which she characterizes as expression protected by the First Amendment, because it "cannot survive strict, or even close, scrutiny." Petitioner argues that "[t]here is no compelling governmental interest" that could justify prosecuting conduit contributions as false statements under Section 1001, rather than as violations of the FECA. *Ibid.* Petitioner, however, was not charged with soliciting political contributions, which is activity protected by the First Amendment. Rather, she was charged with using conduits to disguise the source of political contributions and thereby causing false representations on a matter within the jurisdiction of the FEC. Such conduct is not immunized by the First

Amendment. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); see also *United States* v. *Barker*, 930 F.2d 1408, 1412 9th Cir. (1991) ("There is simply no constitutional right to file a false claim."); *United States* v. *Daly*, 756 F.2d 1076, 1081 (5th Cir.), cert. denied, 474 U.S. 1022 (1985); *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982), cert. denied, 459 U.S. 1227-1228 (1983). Moreover, although petitioner argues (Pet. 29) that the court of appeals' decision would "chill" active participation in political campaigns, ample protection for legitimate contributors is provided by the uniformly recognized requirement that a defendant cannot be held liable for making (or causing) a false statement under Section 1001 unless the government can prove beyond a reasonable doubt that the defendant had actual knowledge of the statement's falsity. Cf. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 280 (1964) (libel against public official relating to official conduct requires proof of "knowledge that [statement] was false or * * * reckless disregard of whether it was false or not").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

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IN THE
SUPREME COURT OF THE UNITED STATES

Maria Hsia,
Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF

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In its Brief in Opposition, Respondent states that proof of knowledge of illegality is not necessary under the "willfulness" prong of 18 U.S.C. § 2(b) when an individual causes an intermediary to make a false statement to the Federal Election Commission. Respondent aligns the Second Circuit's opinion in *United States* v. *Gabriel*, 125 F.3d 89 (CA2 1997) with the District of Columbia Circuit's approach here, and states that the "practical difference" between these circuits and the Third Circuit's approach in *United States* v. *Curran*, 20 F.3d 560 (CA3 1994), is "relatively small."[1] Br. in Opp. 9.

Contrary to Respondent's assertions, the difference between specific and general intent is not relatively small. Compare *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), with *Staples* v. *United States*, 511 U.S. 600 (1994). The Third Circuit requires the government prove beyond a reasonable doubt specific intent in a false statement case in the election law context, whereas the D.C. Circuit has been interpreted as requiring the government to prove none, because defendants can be convicted despite honest and reasonable mistakes of fact.

Moreover, the Second Circuit's decision in *Gabriel* does not parallel with the D.C. Circuit because it does not address false statements made in the context of a complex regulatory scheme. Respondent's argument that the *Gabriel* court was critical of *Curran* suggests that *Gabriel* did not follow *Curran* although it presented the same issues as the petition

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[1] Respondent also suggests that the Third Circuit might overrule *Curran* in light of the Second Circuit's alignment with *Hsia* in *Gabriel*. Br. in Opp. 14. It cites no authority for this statement, and in light of the differences outlined *infra* between *Curran* and *Gabriel*, this prediction is unfounded.

presents here.[2] This is disingenuous, and because this Court has held that knowledge of illegality is required in complex reporting requirement cases, the petition should be granted. *Ratzlaf*, 510 U.S. at 141-46 (1994); *Cheek* v. *United States*, 498 U.S. 192, 199-201 (1991).

1. The petition for certiorari presents two questions regarding the knowledge required for a conviction under §§ 1001 and 2(b) *in the election law context*. The first question is whether knowledge of illegality is required to prove mens rea under § 2(b) following *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), and *United States* v. *Curran*, 20 F.3d 560, 569 (CA3 1994). The second question is whether knowledge of the facts that comprise the substantive offense is required under the "knowing and willful" language of § 1001.[3] *Bryan* v. *United States*, 524 U.S. 184, 192-93 (1998); *Curran*, 20 F.3d at 569.

a. The issue in *Hsia I* was how to define willfulness under § 2(b) in conjunction with the knowledge required by § 1001. The "intent" or "mens rea" question was whether to

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2 In addition to *Gabriel*, Respondent cites to a number of willfulness cases outside the federal election law context that are also inapposite. Br. in Opp. 10, citing *United States* v. *Daughtry*, 48 F.3d 829, 831 (CA4 1995), *vacated on other grounds*, 516 U.S. 984 (1995); *United States* v. *Yermian*, 468 U.S. 63 (1984); *United States* v. *Hopkins*, 916 F.2d 207 (CA5 1990).

3 Respondent formulates this question as a jury instruction challenge and states that it "does not merit certiorari review because it was neither pressed nor passed upon below." This argument ignores that the district court and both parties below believed that knowledge of the reporting requirements was not necessary based on the D.C. Circuit's rejection of *Curran*. Thus, Petitioner raises this issue in the context of *Hsia I*, which is a published opinion.

adopt *Curran*'s knowledge of illegality requirement, or apply a lesser mens rea requirement, *i.e.*, intent to cause statements to be made. The D.C. Circuit chose the lesser standard, defining the test for willfulness under § 2(b) as "the defendant [must] intentionally cause[ ] such statements to be made by another." *United States* v. *Hsia*, 176 F.3d 517, 522 (D.C. Cir. 1999) (*Hsia I*), citing *Gabriel*, 125 F.3d 89, 101 (CA2 1997).

The brief in opposition does not explain how the D.C. Circuit's definition is similar to *Curran* except to state that "in cases like this the government will ordinarily show[4] that the defendant had some knowledge of the law in order to show the defendant's knowledge of falsity." Br. in Opp. 13-14. This statement confuses knowledge of the law (willfulness under § 2(b)) with knowledge of falsity (*Hsia I*'s definition of the mens rea for the underlying offense—§ 1001). Thus, Respondent's argument is inapposite, because it cannot explain the square circuit split on the proper definition of willfulness in federal election law cases by relying on a different element of the offense.

b. Respondent next contends that §§ 1001 and 2(b) have "settled interpretations" that do not require knowledge of illegality, again suggesting that the Second Circuit's opinion in *Gabriel* is applicable. Br. in Opp. 13. But *Gabriel* does not conflict with *Curran*, nor does it reject the knowledge of illegality requirement in complicated regulatory scheme cases. *Id.* at 101-02, citing *Ratzlaf*, 510 U.S. at 141 (currency reporting violation), and *Cheek*, 498 U.S. at 200-01 (false statement violation in context of the tax laws).

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4 What the government will "ordinarily" show is not relevant; the issue is what it must prove.

Instead, *Gabriel* distinguishes *Curran*. Whereas *Curran* involves a complex regulatory scheme (the federal election laws), the regulatory scheme in *Gabriel* is "quite uncomplicated." *Gabriel*, 125 F.3d at 102. This case is more analogous to *Curran* because as the Second Circuit noted in *Gabriel*, the decision as to whether knowledge of illegality is required under § 2(b) turns on the context of the offense. *Gabriel* expressly states that it does not follow *Curran* because *Curran* applies specifically to "cases brought under sections 2(b) and 1001 in the federal election law context." *Id.* at 101. This Court naturally should follow *Curran*, as this is also a § 2(b) case in the federal election law context, and *Ratzlaf* and *Cheek* because this is a complex regulatory scheme case that requires knowledge of illegality under § 2(b).

2. *Gabriel* also supports Petitioner's second question, because even if knowledge of illegality is not required under § 2(b), more than knowledge of falsity is required to support the substantive offense (§ 1001). *Id.* at 101 n.9. Again, Respondent states that because the government will ordinarily have to show knowledge of the law to show that the defendant knew that the statement was false, this case does not warrant review. Br. in Opp. 13-14.

This assumption is misplaced because *Hsia I* can be interpreted, and was interpreted here, to mean that the defendant does not have to know the FEC's regulatory scheme so long as she knows that the names of the contributors are false.[5] But proof of knowledge of the

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[5] If this were true, a felony conviction under §§ 1001 and 2(b) would require less intent than a FECA conviction for causing contributions in the name of another. See 2 U.S.C. § 441f (requiring specific intent).

regulatory scheme, *i.e.*, that "true source" is required, in a complex regulatory case is the *only* way to show that Petitioner knows that a statement will be made to the FEC and that it will be false.

Respondent again relies on its premise that *ordinarily*, it will have to show that the defendant knew that the "listing of a particular person as the contributor means that the person was 'the true source of the money,' rather than 'the person in whose name money is given.'" Br. in Opp. 13. Because Respondent acknowledges that *Hsia I* can be misinterpreted, and because it was here, this petition warrants review. The error removed the issue of Petitioner's knowledge altogether from the jury's consideration. Thus, even though the government states that "ordinarily" it will have to prove that the defendant knew that true source was required, the jury was instructed that Petitioner's knowledge was irrelevant.

The district court did not require the government to prove knowledge of illegality *or* knowledge of "true source" reporting; thus, Petitioner was convicted on a strict liability theory in the election law context. Petitioner's jury was instructed that if she caused the false statements to be made, she was guilty whether or not she knew that her actions would result in such offense.

Further, whereas the Second Circuit in *Gabriel* could infer knowledge from the jury's finding of criminal intent, this Court cannot make the same inference because Petitioner's jury was told expressly to disregard whether she knew the FEC rules and regulations. *Gabriel*, 125 F.3d at

98-99. Nothing prevents other courts from interpreting *Hsia I* in this same manner.[6]

3. This petition warrants the Court's review to prevent future courts from interpreting *Hsia I* the way the district court did, as removing the defendant's knowledge entirely from the substantive offense.

Curran correctly follows this Court's analysis of "knowledge" in *Bryan* and "willfulness" in *Ratzlaf*. *Bryan*, 524 U.S. at 192-93; *Ratzlaf*, 510 U.S. at 149. Where the underlying statute requires knowledge and willfulness, "knowingly" refers to proof of the facts that comprise the underlying offense. *Bryan*, 524 U.S. at 192-93. "Willfully" requires either a culpable state of mind or knowledge of the law. *Id.*

Hsia I ignored *Bryan*'s requirement of knowledge.[7] This is true regardless of the proper definition of "willfully" in the election law context. Whether this Court decides that knowledge of illegality is required to satisfy the element of "willfulness" like *Curran*, or only requires intentional causation like *Hsia*, *Bryan* still requires proof that Petitioner knew that a false *statement* would be made (knowledge of the underlying offense). *Bryan*, 524 U.S. at 192-93.

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6 Although then Chief Judge Edwards exclaimed at oral argument that it looked like the government made this a strict liability offense, there is nothing in the published record to suggest that the government's or the district court's interpretation of *Hsia I* (or the case itself) is incorrect.

7 Or, a generous interpretation might be that *Hsia I* only addressed a defendant's knowledge of one of the elements—falsity. It ignored whether Petitioner knew that statements would be made.

That the government brought this case under § 2(b) because Petitioner did not make a false statement herself does not change the analysis. In this complex, First Amendment-regulated arena, the § 2(b) "causing" element is much more than just causing another to act; Petitioner had to know that she was causing reports to be false.[8] The underlying regulatory scheme that makes the reports false also requires a "knowing and willful" violation to impose a criminal penalty.[9] Pet. App. 169a-170a.

As the D.C. Circuit's opinion stands, only knowledge of falsity of the statements is required. *Hsia I*, 176 F.3d at 522. Respondent's statement that general knowledge of the FEC regulatory scheme is sufficient (Br. in Opp. 15) is nonsensical in this highly regulated, comprehensive, First Amendment-sensitive, statutory scheme. *Buckley* v. *Valeo*, 424 U.S. 1, 40-41 (1976) (noting that specificity and "'[p]recision of regulation'" is required where statutory limitations "impose[ ] criminal penalties in an area permeated by First Amendment interests).

Respondent argues that because the government had to prove that "a political committee treasurer made a false statement or representation to the Federal Election Commission" that this instruction satisfied the element of knowing "that federal election contributions were reported to the FEC." Br. in Opp. at 15 & n.3. As the petition states,

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8 Petitioner's indictment stated that she "knowingly and willfully caused the submission of a materially false statement to the FEC." J.A. 61-62, 64, 66, 68.

9 The March 2002 amendments to the federal election laws do not alter the "knowing and willful" intent requirement. Pub. L. No. 107-155, § 315(b), 116 Stat. 108 (March 27, 2002).

however, this argument is flawed because this instruction does not tell the jury that *Petitioner* has to know about the reporting requirements. Pet. App. 20-21. Instead, it starts from the premise that a statement is made, and instructs that if that statement is false, the defendant caused it. The confusion obviously stems from *Hsia I*'s "willfulness" analysis; thus, the petition requires review.

CONCLUSION

For the foregoing reasons, and for those set forth in the petition, the petition for a writ of certiorari should be granted.

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